Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., AND KEVIN F. HOBBS,

Petitioners,

v.

ESQ BUSINESS SERVICES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If the interstate commerce activities of a client require it to seek non-litigation legal services, may a state in which these activities occur prevent this non-resident client from using its counsel of choice?

2. Whether a state can prevent a client from retaining an out-of-state attorney in the arbitration of a contractual dispute that involves interstate commerce and is subject to the Federal Arbitration Act?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Birbrower, Montalbano, Condon & Frank, P.C., and Kevin F. Hobbs respectfully pray that a writ of certiorari issue to review the judgment of the California Supreme Court in this case.

OPINIONS BELOW

The opinion of the California Supreme Court that gives rise to this petition is reported at 17 Cal.4th 119 [70 Cal.Rptr.2d 304; 949 P.2d 1; 1998 Cal. LEXIS 2] (1998) and is reproduced in the Appendix at App. 1. The order modifying the opinion, but not changing the judgment, is reported at 90 Cal.Daily Op. Service 1376 [98 D.A.R. 1871] (1998). App. 43. The opinion of the Sixth Appellate District of the California Court of Appeal is reported at 49 Cal.App.4th 801 [56 Cal.Rptr.2d 857; 1996 Cal.App. LEXIS 908] (1996). App. 45. The order of the Santa Clara County Superior Court is unreported. App. 60.

JURISDICTION

The California Supreme Court entered judgment on January 5, 1998. On March 5, 1998, Justice O'Connor granted petitioner's application for an extension of time to file a petition for a writ of certiorari and extended the time to and including May 5, 1998. App. 44. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Business & Professions Code section 6125 provides:

> No one shall practice law in California unless the person is an active member of the State Bar.

California Business & Professions Code section 6126(a) provides:

> Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, is guilty of a misdemeanor.

Article I, section 8, clause 3 of the Constitution of the United States grants Congress the authority:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Birbrower, Montalbano, Condon & Frank, P.C. is a New York law corporation located in New City, New York. Petitioner Kevin F. Hobbs is a lawyer employed by the Birbrower firm (collectively the "Firm").

In 1986 the Firm began representing the Sandhu family in various business matters. Kamal Sandhu was the sole shareholder of ESQ Business Services Inc., a New York Corporation ("ESQ-NY"), of which his brother Iqbal

Sandhu was the vice-president. In 1990, Kamal Sandhu and Diane Sandhu (Iqbal Sandhu's wife) contacted Hobbs to request his assistance in reviewing a proposed Software Development & Marketing Agreement (the "Agreement") with Tandem Computers. The Agreement granted Tandem worldwide distribution rights to computer software created by ESQ-NY. After Hobbs reviewed the already-drafted Agreement and proposed revisions, ESQ-NY and Tandem signed the Agreement.

Thereafter, a second corporation, also named ESQ Business Services, Inc. ("ESQ-CA"), was incorporated in California. ESQ-CA is owned and operated by Iqbal Sandhu and Diane Sandhu. In 1991, Iqbal Sandhu consulted the Firm concerning Tandem's performance under the Agreement, which called for binding arbitration in California under the American Arbitration Association Commercial Arbitration Rules. Hobbs advised the Sandhus regarding the parties' respective rights and obligations under the Agreement.

In 1992, at ESQ's request, the Firm agreed to represent ESQ-NY and ESQ-CA.[1] Both entities signed a fee agreement with the Firm setting forth the details of this representation. The Firm was authorized to investigate and prosecute claims against Tandem for copyright infringement, antitrust violations, and breach of contract. The fee agreement was executed in New York but was later modified to a fixed fee agreement in California. Because the ESQ-Tandem Agreement was entered into

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[1] The dissent emphasized that the firm represented both ESQ-NY and ESQ-CA. App. 32.

between ESQ-NY and Tandem, the claims against Tandem were actually "owned" by the New York corporation. Accordingly, the fee agreement specifically authorized Iqbal Sandhu to take all action required to prosecute and resolve the claims and causes of action against Tandem on behalf of ESQ-NY.

Over the next year, the Firm spent over 1,000 hours working on the case in the Firm's New York office. The Firm investigated ESQ's potential claims against Tandem, researched a myriad of legal issues, interviewed witnesses, analyzed thousands of documents, and engaged in negotiations with Tandem in an attempt to resolve the dispute. In February 1993, at the direction of ESQ, the Firm filed for arbitration against Tandem with the American Arbitration Association in San Francisco.

Between August 1992 and April 1993, Hobbs and two other Firm attorneys made two brief trips to California to discuss strategy with ESQ, meet with ESQ's accountants, negotiate with Tandem representatives, and interview potential arbitrators. On August 30, 1993, Hobbs traveled a third time to California at ESQ's request to assist in settlement negotiations with Tandem. The next day, ESQ and Tandem entered into a settlement agreement that resolved the dispute. The matter was never arbitrated.

B. Trial Court Proceedings

In January 1994, ESQ-CA and Iqbal Sandhu filed a lawsuit against the Firm for legal malpractice and related claims. The Firm removed the matter to federal court and filed a counterclaim for breach of contract. ESQ-NY joined the lawsuit as a plaintiff and the matter was then

remanded to superior court. On November 16, 1995, ESQ filed a Motion for Summary Judgment and/or Adjudication. ESQ asserted that because the Firm traveled to California three times to consult with ESQ and to assist in the negotiations with Tandem, the Firm engaged in the unauthorized practice of law in California, in violation of Business and Professions Code section 6125. ESQ argued that, as a result, the fee agreement was unenforceable.

The Firm's Opposition to the Motion for Summary Judgment explained that the Agreement involved the worldwide marketing of software and cited authority holding that, in cases involving interstate transactions, an attorney may recover fees even though some of the services rendered by him were in a state where he was not admitted to practice.

In addition, the Firm cited authority permitting an out-of-state attorney to recover his fees for services rendered before a federal court in California. The Firm argued that just as the state cannot regulate the practice of law before federal courts, it cannot regulate the representation of parties in disputes before the American Arbitration Association ("AAA"). The Firm also argued that because the AAA Commercial Arbitration Rules do not require a party to be represented by an attorney, it did not engage in the unauthorized practice of law.

C. Sixth District Court of Appeal

The Santa Clara County Superior Court granted ESQ's Motion for Summary Adjudication. The Firm filed a Petition for Writ of Mandate and/or Prohibition with the Sixth Appellate District of the California Court of

Appeal. The court of appeal denied the Firm's Petition for Writ of Mandamus, ruling that (1) because the Firm is not licensed in California, it engaged in the unauthorized practice of law in violation of Business and Professions Code section 6125, and (2) the fee agreement was unenforceable regardless of where the work was performed. App. 53, 58. The court of appeal held that the supremacy clause issues present in the regulation of practice before federal courts do not apply to a AAA forum. App. 54. In addition, the court of appeal rejected the Firm's "interstate representation" argument. App. 57.

D. California Supreme Court

The California Supreme Court granted review. Prior to oral argument, several parties filed amicus curiae briefs with the court. The State Bar of California argued that no exceptions to Business & Professions Code section 6125 applied to the Firm's conduct. In reply to the State Bar's brief, the Firm argued that, in non-litigation matters involving issues of interstate commerce, a client should be free to retain an out-of-state lawyer. During oral argument, the parties discussed at length the impact of the court of appeal's ruling on interstate commerce.

In addition, the Firm argued in its reply to the State Bar that the Federal Arbitration Act (9 U.S.C. § 1 et seq.) ("FAA") preempted Business & Professions Code section 6125. The Firm asserted that the FAA governed the arbitration as the dispute pertained to interstate commerce, and that federal law does not require a locally licensed attorney to arbitrate the case. Therefore, the Firm argued the state could not interfere with a client's right to hire

his or her counsel of choice for an arbitration governed by the FAA.

On January 5, 1998, the California Supreme Court held that, to the extent the Firm performed legal services in California, it engaged in the unauthorized practice of law. App. 2. The court reversed the court of appeal in part by holding that on remand the Firm may be entitled to recover fees for services it performed in New York. App. 3, 28-29.

In the majority opinion, the California Supreme Court conceded that the California Bar does not regulate practice before the United States courts located in California. App. 13. The court, however, rejected the Firm's argument that the FAA preempted California law and prohibited the application of section 6125. App. 20. In addition, the court distinguished a federal case that held an out-of-state attorney can recover fees for services rendered in an arbitration proceeding. App. 18. The dissent argued that the majority's attempt to distinguish this authority was "unpersuasive." App. 42.

On February 25, 1998, after receiving numerous third party correspondence urging the Court to clarify or expand the exceptions to Business and Professions Code section 6125 (*see* letter from California Dispute Resolution Council, reproduced at App. 69-71.), the California Supreme Court modified its opinion by specifying that the statute does not apply to certain labor arbitrations. The court added the following language after the first sentence and citation at App. 14:

> "Likewise the [State Bar] Act does not apply to the preparation of or participation in labor

> negotiations and arbitrations arising under collective bargaining agreements in industries subject to federal law. (See, e.g., *Teamsters Local v. Lucas Flour Co.* (1962) 369 U.S. 95, 103; see also Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a)."

Modification also reprinted at App. 43.

The court did not respond to the Firm's and other third party requests for further briefing and a rehearing. *See* letter from Marshall L. Small, General Counsel, Morrison & Foerster LLP (March 3, 1988) at App. 64-68; letter from Nancy K. Undem (February 27, 1988) at App. 72-74.

REASONS FOR GRANTING THE WRIT

This petition questions the constitutionality of certain applications of the California unauthorized practice of law ("UPL") statute. These statutes, which in one form or another exist in all 50 states, prohibit and in some instances criminalize the unauthorized practice of law. In this matter, the California Supreme Court held that a lawyer violated the California UPL statute by representing a business involved in an interstate commerce transaction and dispute. Conflicting with (1) other states' interpretations of similar statutes, and (2) the published opinion of the Chief Reporter for the American Law Institute's Restatement of the Law Governing Lawyers, the California Supreme Court's opinion unconstitutionally burdens interstate commerce by requiring businesses to retain separate counsel in each state in which they operate.

This opinion requires businesses with multi-state concerns to retain and pay for additional legal advice which, in most instances their primary outside or general counsel (collectively "general counsel") can competently provide. For companies involved in interstate business, this opinion will add an unnecessary layer of bureaucratic structure, increasing costs and decreasing the company's efficiency and ability to compete for legitimate business.

Incredibly, a fair reading of the California Supreme Court's opinion provides under circumstances where an out-of-state company requires legal counsel regarding an interstate commerce matter impacting California, any assistance its general counsel might provide from out of state, even to local retained counsel, may violate California law. In a footnote, the court states:

> Contrary to the trial court's implied assumption, no statutory exception to section 6125 allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar.

App. 6 at note 3.

Moreover, this opinion effectively precludes a company from exercising its right to retain its counsel of choice. Indeed, under this opinion, general counsel faces potential misdemeanor charges for representing a client in an interstate business transaction or dispute where the activity touches a state in which this lawyer is not licensed.

Compounding the complicated issue of multi-jurisdictional law practice, state court opinions conflict with

one another regarding the circumstances under which a lawyer from out of state may provide legal advice impacting a business in a state in which the lawyer is not licensed. Some opinions, including the one giving rise to this petition, conflict with the American Bar Association's Model Code of Professional Responsibility that encourages the breakdown of artificial barriers to promote the efficiency of interstate business. Interestingly, because of these conflicts, a company seeking to do business in two states in addition to its home state may find one state (like Michigan), willing to allow the out-of-state general counsel to negotiate transactions there, while the other (like California), imposing criminal penalties for providing comparable representation.

Limitations on a company's choice of lawyer in non-public forum arbitration practice concerning interstate matters also impermissibly burden commerce. A company should be free to choose its own general counsel to represent it in such a forum. Yet, contrary to the position of several other states, the opinion at issue prevents the company from doing so.

Surprisingly, in a dispute concerning interstate commerce, some courts have made it impossible for an out-of-state lawyer to participate in alternative dispute resolution procedures occurring in their states, even though they would allow that same lawyer to appear in their courts were the dispute venued there. Indeed, absent unusual circumstances, a federal or state court would undoubtedly grant permission for out-of-state counsel to appear in a formal proceeding. However, in an arbitration context there is no recognized *pro hac vice* admission procedure, and incredibly, the California Supreme Court

blatantly implies even the association of local counsel in an arbitration will not insulate the out-of-state attorney from the effect of the UPL statute.

Some courts, apparently striving to avoid finding the out-of-state attorney violated the state's UPL statute, hold arbitration practice does not fall within the definition of "practice of law" at all. Unpersuasively, the California Supreme Court distinguished these opinions by suggesting preparing for an arbitration constitutes the practice of law, while the actual arbitration activity itself may not be. App. 18.

This Court should grant this petition and issue a ruling that allows businesses engaged in interstate commerce to use their general counsel in multi-state transactions and arbitrations free from state interference. Indeed, the increasing demand for legal counsel in matters involving interstate business will continue to create more conflicts with state UPL statutes across the nation. These conflicts demonstrate the need for this Court to establish a uniform standard for multi-state representation.

I. The California Supreme Court's Decision Discriminates Against And Unduly Burdens Interstate Commerce By Preventing Businesses From Retaining Their Counsel of Choice

Consider the following hypothetical: Assume a New York company has been in the telecommunications business for ten years. The company has an established relationship with one law firm, whose lawyers are members of the New York bar only. The New York company

decides to license certain intellectual property to a California company, and calls on its New York counsel to represent it in the transaction. New York counsel is already substantially familiar with the New York company's business, and has participated in drafting all of its transactional documents, including a similar licensing agreement with a Michigan company. Should the New York company be precluded from using its New York law firm to negotiate and draft the documents because the contemplated license will be with an out-of-state company?

Clients have a strong interest in being able to retain the counsel of their choice. This choice can be profoundly personal. This decision is based on a variety of factors including: proficiency, efficiency, cost, recommendation, trust and gut-feeling. Commentators recognize that:

> [a] client's preference for counsel can be especially strong when an out-of-state lawyer has been representing the client in other matters and they have developed a strong working relationship.

Carol Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 Kan. L. Rev. 453, 476 (1997).

Not surprisingly, "the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment."[2] *Wheat v. United States*, 486 U.S.

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[2] There are also First Amendment considerations that support the right to counsel of choice. This Court's decisions in *NAACP v. Button*, 371 U.S. 415 (1963) and *United Mine Workers v.*

153, 159 (1988). A company's right to select its counsel in an interstate commerce transaction is analogous to the defendant's right in the Sixth Amendment context. This is particularly so where the anticipated transaction may be a "make or break" one for the company.

In the civil context, some courts specifically recognize the right of clients to choose an out-of-state lawyer to represent them in matters involving interstate commerce. The Supreme Court of New Jersey acknowledged that:

> [w]hile the members of the general public are entitled to full protection against unlawful practitioners, their freedom of choice in the selection of their own counsel is to be highly regarded and not burdened by "technical restrictions which have no reasonable justification."

Estate of Waring, 47 N.J. 367, 375 [221 A.2d 193, 197] (1966) (citations omitted).

Under California law (and the law of other states), New York counsel in the hypothetical would be precluded from representing the New York client in negotiating and drafting the intellectual property license where the licensee is a California company. Said differently, California discriminates against interstate commerce by interfering with the New York company's choice of counsel. Indeed, the New York law firm would likely refuse to

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Illinois Bar Association, 389 U.S. 217 (1967) implicitly support the right to counsel of choice.

accept the assignment as it could lead to a criminal prosecution for the unauthorized practice of law under California Business and Professions Code section 6126(a). As a result, the New York company will incur additional costs and expenditures of time in a search for new California counsel. California counsel would then have to ascend the learning curve the New York counsel had previously climbed. And, of course there is no guarantee any California counsel could establish the comfort or competency level previously existing and achieved between and by the New York counsel and the client.

Although the California Supreme Court acknowledges the need to "accommodate the multistate nature of law practice" (App. 21), the effect of the ruling indicates otherwise. As the hypothetical demonstrates, by applying UPL statutes to effectively preclude out-of-state companies from using their general counsel to represent their interests in interstate business, states impose unnecessary and impermissible restrictions on interstate commerce.

The Commerce Clause "directly limits the power of states to discriminate against interstate commerce." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988). "This 'negative' aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.* at 273-74.

In general, there are two types of impermissible regulations. First, state statutes that clearly discriminate against interstate commerce, either on their face or in practical effect, are routinely struck down unless the discrimination is demonstrably justified by a legitimate state

interest unrelated to economic protectionism. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986). Second, even if a statute is found to be facially neutral and nondiscriminatory, it still may be invalid if the burden on interstate commerce clearly outweighs the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). There is, however, no clear division separating these categories. "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986).

The California State Bar generally asserts the purpose of requiring State Bar membership is to protect its citizens from unqualified or unethical lawyers. This rationale, however, carries little or no weight when applied to businesses conducting interstate commerce. As sophisticated legal consumers, corporations are in little danger of hiring incompetent counsel. *See* Daniel A. Vigil, *Regulating In-House Counsel: A Catholicon or a Nostrum*, 77 Marq. L. Rev. 307, 320 (1996). The California Supreme Court's decision impinges the right of clients to retain their counsel of choice.

While California has an interest in regulating out-of-state lawyers that appear before its courts or wish to permanently set up shop in California, it has little interest in prohibiting an out-of-state lawyer from visiting California merely to assist a multi-state client negotiate a contract, or resolve a dispute involving interstate commerce. Applying California's UPL statute in these situations simply does not further the state's interest in protecting clients from unskilled or unethical lawyers.

The effect of the California Supreme Court's ruling is comparable to the local-processing requirements that this Court has consistently invalidated. In *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), this Court invalidated an Arizona statute requiring that all Arizona cantaloupes be packed in Arizona. This requirement was purportedly enacted to enhance the reputation of and demand for Arizona's high quality cantaloupes. This Court held that while the state had a legitimate (though tenuous) interest, it was clearly outweighed by the national interest in unencumbered commerce.

> [T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home state that could be more efficiently performed elsewhere. Even where the State is pursuing a clearly legitimate state interest, this particular burden on commerce has been declared to be virtually per se illegal.

Pike, 397 U.S. at 145. In *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994), this Court held that a local or state government could not even require its own garbage be processed locally as it deprived out-of-state firms the opportunity to do the processing.

In the matter at hand, the California Supreme Court's application of Business & Professions Code section 6125 similarly requires that contracts involving interstate commerce be "processed" by California lawyers. Requiring California lawyers to negotiate all contracts and resolve any dispute that involves California parties or California law places out-of-state companies at a distinct disadvantage when doing business in the state.

This petition therefore asks the Court to review whether the California statute and many like it impermissibly burden interstate commerce by requiring out-of-state companies to incur additional expense, time, and the loss of key negotiators or advocates when they do business with California companies and need the services of counsel.

II. This Petition Raises Issues Of National Importance That Are Ripe For Adjudication

In recent decades, the number of businesses conducting interstate and international commerce has grown substantially. In today's information based global economy, businesses in all sectors enter into contracts and sell goods and services nationwide. As a result, these businesses have demanded that their attorneys follow them across state and national borders.

Commentators note that a number of structural, educational, technological, and constitutional changes are responsible for the dramatic increase of multi-jurisdictional practice of law:

> Lawyers and clients are far more mobile than they were ten or twenty years ago. There is much greater uniformity in the law. . . . The Uniform Commercial Code governs a large number of commercial transactions. Correspondingly, differences in substantive law among the states are decreasing. Furthermore, federal law routinely extends into activities and realms traditionally thought of as the sole province of the states. Finally the law has grown so complex that lawyers can no longer master the minimum

> amount necessary to claim competence as generalists. . . . The complexity hinders clients' ability to employ local counsel and drives them to hire national experts whose offices may be far from the clients' actual place of business or headquarters.

Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice – Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. Tex. L. Rev. 717, 723-25 (1995). *See also* Samuel J. Brakel & Wallace D. Loh, *Regulating Multistate Practice of Law*, 50 Wash. L. Rev. 699, 699-700 (1975).

Moreover, innovations in telecommunications, online research, and transportation have enabled lawyers to serve clients' operations located across the country just as effectively as those located across the street. For interstate and international businesses, it is not only common, but often-times absolutely necessary, for their attorneys to conduct business in another state in which they are not licensed.

Despite the increasing volume of interstate commerce, many states are erecting barriers to the free flow of goods and services through the overbroad application of their UPL laws. All fifty states and the District of Columbia currently prohibit the unauthorized practice of law. Carole Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 Kan. L. Rev. 453, 458 (1997). In addition to prohibiting non-lawyers from practicing law, these regulations apply to lawyers licensed to practice law in other states. Thirty-seven states make unauthorized practice of law a misdemeanor, while others regard it as a contempt of court. Deborah L. Rhode, *Policing the Professional*

Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 Stan. L. Rev. 1, 45 (1981). These prohibitions are broad and largely undefined. Many jurisdictions simply proscribe, without defining, the practice of law. *Id.*

II. This Petition Should Be Granted To Resolve Conflicting Interpretations of State UPL Statutes As These Decisions Create Confusion and Uncertainty For Businesses Conducting Interstate Commerce

Conflicting state decisions in applying these UPL statutes create a deceptive trap for clients involved in interstate commerce and their lawyers. In contrast to the opinion at issue, a number of cases implicitly or explicitly acknowledge the propriety of multi-jurisdictional representation. *See Williamson v. John D. Quinn Const. Corp.*, 537 F.Supp. 613 (S.D.N.Y. 1982); *Appell v. Reiner*, 43 N.J. 313 [204 A.2d 146] (1964); *Spanos v. Skouras Theaters Corp.*, 364 F.2d 161 (2nd Cir. 1966) (en banc), *cert. denied*, 385 U.S. 987 (1969); *Cowen v. Calabrese*, 230 Cal.App.2d 870 [41 Cal. Rptr. 441] (1964); *Western Life Insurance Co. v. Nanney*, 296 F.Supp. 432 (E.D.Tenn. 1969).

For example, in *Appell v. Reiner*, 43 N.J. 313 [204 A.2d 146] (1964), the court observed that a New York attorney's professional representation of a client concerning interstate activity which touched New Jersey constituted the "practice of law," but went on to state:

> recognition must be given to the numerous multi-state transactions arising in modern times. . . . [I]nflexible observance of the generally controlling doctrine may well occasion a result detrimental to the public interest; and it

> follows that there may be instances justifying such exceptional treatment and warranting the ignoring of state lines.

Appell, 43 N.J. at 316. Further, in refusing to find that a New York law firm violated the New Jersey UPL statute by representing the estate of a New Jersey resident, the New Jersey high court said, "Multistate relationships are a common part of today's society and are to be dealt with in commonsense fashion." *Estate of Waring*, 47 N.J. 367, 375 [221 A.2d 193] (1966).

Moreover, perhaps the preeminent authority on these issues, Professor Charles Wolfram, author of *Modern Legal Ethics* and the Chief Reporter for the American Law Institute's Restatement of the Law Governing Lawyers, asserts that a court should not apply a state UPL statute to an out-of-state attorney so long as the attorney only infrequently gives legal advice in the state in which the attorney is not licensed and the legal matters involve significant interstate features. *See* Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. Tex. L. Rev. 666, 709-13 (1995).

Other courts agree. Instead of giving lip service to the multistate nature of law practice, Judge Friendly of the Second Circuit recognized it. He said,

> [i]n an age of increased specialization and high mobility of the bar, this must comprehend the right to bring to the assistance of an attorney admitted in the resident state a lawyer licensed by "public act" of any other state who is thought best fitted for the task, and to allow him to serve in whatever manner is most effective,

> subject only to valid rules of courts as to practice before them.

Spanos v. Skouras Theaters Corp., 364 F.2d 161, 170 (2nd Cir. 1966) (en banc), *cert. denied*, 385 U.S. 987 (1969).

The American Bar Association has long acknowledged that clients need their lawyers to be able to serve them across state lines. Model Code of Professional Responsibility, Ethical Consideration 3-9 states:

> Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal professions should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested manner in a tribunal before which the lawyer is not permanently admitted to practice.[3]

Indeed, Ethical Consideration 8-3 of the Model Code of Professional Responsibility encourages the dismantling of

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[3] *See also* ABA Comm. on Professional Ethics, Formal Op. 316 (1967).

artificial barriers to interstate commerce where multistate law practice is concerned:

> . . . Clients and lawyers should not be penalized by undue geographical restraints on representation of legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admissions procedures consistent with the needs of modern commerce.

Some states have accepted these above-stated rationales by promulgating regulations enhancing the ease of transacting interstate business within their borders. For example, the state of Michigan enacted a single sentence exception to its UPL statute. The exception reads as follows:

> This section does not apply to a person who is duly licensed and authorized to practice law in another state while temporarily in this state and engaged in a particular matter.

Mich. Stat. Ann. § 27A.916 (1997).

Compare the above-cited authority with the California Supreme Court's opinion at issue that acknowledges only five exceptions to California's UPL statute. Despite citing Ethical Consideration 3-9 of the Model Code of Professional Responsibility (App. 11), the California Supreme Court stated the only exceptions are: (1) an attorney making brief appearances before a state court or tribunal (App. 12); (2) an attorney appearing before a court as counsel pro hac vice (*id.*); (3) an attorney appearing in a United States tribunal (App. 13); (4) a foreign legal consultant who may advise on the law of the foreign jurisdiction (*id.*); and (5) an individual participating in an

arbitration or conciliation of international commercial disputes. *Id.*

The California Supreme Court recognized another exception in its modification published two months after its original opinion. This newly created exception provides that an attorney who participates in labor negotiations or arbitrations under collective bargaining agreements is not subject to the California UPL statute. App. 14, 43. This modification resulted from the outcry of attorneys practicing in this arena, who wrote to the Court to emphasize the profound impact this ruling would have on such interstate commerce issues. However, with now only six recognized exceptions that allow an out-of-state attorney to assist a client involved in interstate commerce activities, such businesses remain substantially handcuffed regarding these interstate matters which do not fall within these exceptions.

With this direct conflict between states, a company will be unsure whether it may use its general counsel in a matter affecting another state. If the matter is transactional in nature, perhaps this company will call on its general counsel who then might associate local counsel in the state in which the other contracting company resides. However, as previously mentioned, even this association does not insulate the out-of-state general counsel in California as the California Supreme Court declared that associating local counsel does not remove the lawyer from the reach of the UPL statue. App. 6 at note 3.

Practically speaking, even if associating local counsel in such circumstances insulated the out-of-state general counsel from prosecution in the jurisdiction where the

other contracting party resides, the costs and problems of such association might simply not be worth assuming. Professor Wolfram stated:

> it is preposterous to think that when one of the gurus of the mergers and acquisitions bar, Joseph Flom or Martin Lipton, emerges from an airplane in a jurisdiction far from New York City that they modestly submit themselves to the "supervision" of whatever locally-admitted lawyer their firms hypothetically might have engaged in an effort to comply with local restrictions on unauthorized practice. Nor is it evident why even mere journey-person lawyers should learn to heel to a local lawyer's obedience school supervision. A client whose tax lawyer traveled to another state to deal with a federal tax matter neither needs nor should be required to pay for another, largely useless lawyer simply to satisfy an empty legal requirement.

Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. Tex. L. Rev. 666, 677-78 (1995) (footnotes omitted). Requiring a client to retain local counsel for every out-of-state transaction does not materially advance the goal of protecting the client. Simply having another lawyer around the conference room does not guarantee the client additional protection, only additional expense.[4]

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[4] *See* Association of the Bar of the City of New York, Committee On Professional Responsibility Report, *The Engagement of Local Counsel And The Pro Hac Vice Admission Of Attorneys* (Feb. 1998) (advocating the elimination of the

Directing out-of-state general counsel to physically stay away from California does not resolve the problem either as the court held:

> [p]hysical presence here is one factor we may consider in deciding whether the unlicensed lawyer has violated section 6125, but it is by no means exclusive.

App. 10.

Similar problems exist if general counsel is asked to represent his or her client in a private arbitration involving interstate commerce in a state in which he or she is not licensed. As indicated, in a court of law, pro hac vice procedures would allow the out-of-state practitioner to represent the company. However, as the Association of the Bar of the City of New York recognized, there is no procedure available or recognized which would or could provide pro hac vice status to the out-of-state general counsel wishing to represent his or her client in an arbitration:

> There are other reasons, too, why representation by an out-of-state attorney should be permitted. Such counsel tends to be the regular attorney for the union or for the company who knows the collective bargaining agreement and the facts of the case at hand. The arbitration does not usually require resort to local court procedure. The applicable law is not that of the forum courts but rather of the shop. Considerations that normally call for local legal representation are thus

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requirement that out-of-state attorneys associate local counsel for pro hac vice admission).

> absent. And, quite apart from this, even assuming that the attorney is prepared to seek admission *pro hac vice* in the forum state, how and from whom would he obtain such permission? Certainly, an arbitration tribunal is not authorized to give it to him; and to what courts could he or should he apply?

Association of the Bar of the City of New York Committee Report, *Labor Arbitration and the Unauthorized Practice of Law*, 30 The Record 422, 426-427 (1975).

Clients and their out-of-state general counsel might argue participating in an arbitration does not constitute the actual "practice of law" prohibited by the UPL statute. However, inconsistent state interpretations of what constitutes the "practice of law" exposes the out-of-state attorney to the risk of prosecution. While the California Supreme Court held that representing a client in arbitration constituted the unauthorized practice of law (App. 19), a federal court in New Jersey did not so hold. In *Williamson v. John D. Quinn Const. Corp.*, 537 F.Supp. 613 (S.D.N.Y. 1982), a New Jersey law firm brought an action seeking to recover payment for legal services rendered in an arbitration proceeding held in New York. The former clients asserted, in part, that because the New Jersey attorneys were not licensed to practice law in New York, they could not collect their fees. The court disagreed and held that the New Jersey firm was not precluded from recovering fees even though the attorney who performed the bulk of the services was not admitted to practice in New York. The court noted:

> Plaintiff's services were rendered solely in the arbitration proceeding. An arbitration tribunal

> is not a court of record; its rules of evidence and procedures differ from those of courts of record; its fact finding process is not equivalent to judicial fact finding; it has no provision for the admission pro hac vice of local or out-of-state attorneys. In *Spanos v. Skouras Theatres Corp.*, Judge Friendly held that an attorney not admitted to practice law in New York could recover fees for legal services even though he had not been admitted pro hac vice because "there is not the slightest reason to suppose that if (a motion had been made it) would have been denied." This observation applies with even greater force with respect to an arbitration proceeding which is of such an informal nature.

Williamson v. John D. Quinn Const. Corp., 537 F.Supp. 613, 616 (S.D.N.Y. 1982) (footnotes omitted). As indicated above, the California Supreme Court rejected this reasoning. This leaves attorneys who represent multi-state clients at risk for prosecution for the unauthorized practice of law in other states.

The California Supreme Court ignored the fact that parties resolving a dispute in a private arbitration need not be represented by an attorney at all. Under the American Arbitration Association Commercial Arbitration Rules, a non-attorney may represent a party at an arbitration. Paragraph 22 of the Commercial Arbitration Rules provides: "Any party may be represented by counsel or other authorized representative." Moreover, the Association of the Bar of the City of New York concluded that parties to international or interstate arbitration proceedings conducted in New York may be represented in such arbitration proceedings by persons of their own choosing,

including lawyers not admitted to practice in New York. Association of the Bar of the City of New York Committee Report, *Recommendation & Report on the Right of Non-New York Lawyers to Represent Parties in International and Interstate Arbitrations Conducted in New York,* 49 The Record 47 (1991). Commentators agree with this proposition:

> The requirement that every party to any arbitration proceeding be represented by an attorney would have a most deleterious, if not fatal, effect on the arbitral process. The informality, flexibility, privacy, speed, efficiency and economy of arbitration would be greatly diminished.

Gerald Asken, *Arbitration and the Unauthorized Practice of Law,* N.Y. L.J. Vol. 172 – No. 112 (Dec. 11, 1974).

Should the out-of-state lawyer, however, have to risk prosecution by relying on some court's holding that arbitration practice does not constitute the practice of law? Should this lawyer have to risk that courts will not give effect to the terms in the arbitration agreement? And should the client be forced to accept its second or third choice of counsel?

In light of the vast conflicts and uncertainty this decision has created, this Court should grant this petition and set a uniform national standard to guide clients and lawyers alike. This Court has yet to address the interstate commerce issues inherent in the multi-jurisdictional practice of law, and certainly these same issues will be commonly re-visited by courts across the nation. *See Fought & Co. v. Steel Eng'g & Erection, Inc.,* 1998 Haw. LEXIS 8.

The impact of this decision is far-reaching and threatens the ability of many businesses to conduct interstate commerce. Resolving the question of when an

attorney can represent a client engaged in interstate commerce will ensure such commerce proceed with little interference.

IV. The California Supreme Court's Decision Conflicts with the Federal Arbitration Act

The Federal Arbitration Act (9 U.S.C. § 1 et seq.) governs arbitrations affecting interstate commerce or maritime affairs. The FAA is "a congressional declaration of a liberal federal policy favoring arbitration agreements" that preempts any state substantive or procedural policies to the contrary. *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).[5]

California's UPL statute, as applied by the California Supreme Court, does not foster the federal policy favoring arbitration. Because there is no pro hac vice process for private arbitration, out-of-state attorneys are prohibited from conducting a private arbitration in California. As discussed above, this creates a tremendous burden for out-of-state businesses as they are forced to retain California lawyers in addition to their out-of-state general counsel. By making it more difficult for parties to arbitrate disputes involving interstate commerce, the California Supreme Court has undermined the very goals and policies Congress sought to advance.

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[5] *See also* Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 Wake Forest L. Rev. 1, 37 (1996) ("In contracts involving or affecting interstate commerce, state arbitration acts and other statutes attempting to eviscerate or limit the commercial arbitration process are, by definition, rendered moot by the pro arbitration policy of the FAA.").

Just as the states cannot regulate the practice of law before federal courts and administrative agencies (*see Sperry v. Florida*, 373 U.S. 379 (1963); Thomas J. Andersen, *The Federal Practice Exception: Limitations on State Regulation of Federal Practitioners*, 23 W. St. L. Rev. 281 (1996)), they should not be able to prohibit out-of-state lawyers from representing clients in arbitrations subject to the FAA.

Congress and this Court have recognized the importance of ensuring that arbitration remains a viable and efficient form of alternative dispute resolution. Preventing clients from retaining their out-of-state general counsel in California arbitrations vitiates these goals. Accordingly, pursuant to the Supremacy Clause of the United States Constitution, this Court should grant certiorari and find that California's UPL statute, as applied, conflicts with the FAA and is unenforceable.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., et al., Petitioners, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; ESQ BUSINESS SERVICES, INC., Real Party in Interest.

S057125

SUPREME COURT OF CALIFORNIA

17 Cal. 4th 119; 949 P.2d 1; 1998 Cal. LEXIS 2; 70 Cal. Rptr. 2d 304; 97 Cal. Daily Op. Service 51; 98 Daily Journal DAR 107

January 5, 1998, Filed

SUBSEQUENT HISTORY: As Modified, February 25, 1998.

PRIOR HISTORY: Court of Appeal of California, Sixth Appellate District. H014880. Superior Court of Santa Clara County. Santa Clara County Super. Ct. No. CV737595. John F. Herlihy, Judge.

COUNSEL: Halley, Cornel & Lynch, Roger C. Peters, Hoge, Fenton, Jones & Appel, David P. Eby, William J. Elfving and Scott R. Mosko, for Petitioners.

Latham & Watkins, Joseph A. Wheelock, Jr., and Julie V. King, as Amici Curiae on behalf of Petitioners.

No appearance for Respondent.

Hopkins & Carley, Jon Michaelson, Denise Y. Yamamoto and Robert W. Ricketson, for Real Party in Interest.

Diane C. Yu, Lawrence C. Yee, Mark Torres-Gil, and Robert M. Sweet as Amici Curiae on behalf of Real Party in Interest.

JUDGES: CHIN, J. WE CONCUR: GEORGE, C.J., MOSK, J., BAXTER, J., WERDEGAR, J., BROWN, J. DISSENTING OPINION BY KENNARD, J.

OPINION BY: CHIN

OPINION:

Business and Professions Code section 6125 states: "No person shall practice law in California unless the person is an active member of the State Bar."[1] We must decide whether an out-of-state law firm, not licensed to practice law in this state, violated section 6125 when it performed legal services in California for a California-based client under a fee agreement stipulating that California law would govern all matters in the representation.

Although we are aware of the interstate nature of modern law practice and mindful of the reality that large firms often conduct activities and serve clients in several states, we do not believe these facts excuse law firms from complying with section 6125. Contrary to the Court of Appeal, however, we do not believe the Legislature intended section 6125 to apply to those services an out-of-state firm renders in its home state. We therefore conclude that, to the extent defendant law firm Birbrower, Montalbano, Condon & Frank, P.C. (Birbrower), practiced law in California without a license, it engaged in the unauthorized practice of law in this state. (§ 6125.) We also conclude that Birbrower's fee agreement with real party in interest ESQ Business Services, Inc. (ESQ), is

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[1] All further statutory references are to the Business and Professions Code unless otherwise specified.

invalid to the extent it authorizes payment for the substantial legal services Birbrower performed in California. If, however, Birbrower can show it generated fees under its agreement for limited services it performed in New York, and it earned those fees under the otherwise invalid fee agreement, it may, on remand, present to the trial court evidence justifying its recovery of fees for those New York services. Conversely, ESQ will have an opportunity to produce contrary evidence. Accordingly, we affirm the Court of Appeal judgment in part and reverse it in part, remanding for further proceedings consistent with this opinion.

I. BACKGROUND

The facts with respect to the unauthorized practice of law question are essentially undisputed. Birbrower is a professional law corporation incorporated in New York, with its principal place of business in New York. During 1992 and 1993, Birbrower attorneys, defendants Kevin F. Hobbs and Thomas A. Condon (Hobbs and Condon), performed substantial work in California relating to the law firm's representation of ESQ. Neither Hobbs nor Condon has ever been licensed to practice law in California. None of Birbrower's attorneys were licensed to practice law in California during Birbrower's ESQ representation.

ESQ is a California corporation with its principal place of business in Santa Clara County. In July 1992, the parties negotiated and executed the fee agreement in New York, providing that Birbrower would perform legal services for ESQ, including "All matters pertaining to the

investigation of and prosecution of all claims and causes of action against TANDEM COMPUTERS INCORPORATED [Tandem]." The "claims and causes of action" against Tandem, a Delaware corporation with its principal place of business in Santa Clara County, California, related to a software development and marketing contract between Tandem and ESQ dated March 16, 1990 (Tandem Agreement). The Tandem Agreement stated that "The internal laws of the State of California (irrespective of its choice of law principles) shall govern the validity of this Agreement, the construction of its terms, and the interpretation and enforcement of the rights and duties of the parties hereto." Birbrower asserts, and ESQ disputes, that ESQ knew Birbrower was not licensed to practice law in California.

While representing ESQ, Hobbs and Condon traveled to California on several occasions. In August 1992, they met in California with ESQ and its accountants. During these meetings, Hobbs and Condon discussed various matters related to ESQ's dispute with Tandem and strategy for resolving the dispute. They made recommendations and gave advice. During this California trip, Hobbs and Condon also met with Tandem representatives on four or five occasions during a two-day period. At the meetings, Hobbs and Condon spoke on ESQ's behalf. Hobbs demanded that Tandem pay ESQ $15 million. Condon told Tandem he believed that damages would exceed $15 million if the parties litigated the dispute.

Around March or April 1993, Hobbs, Condon, and another Birbrower attorney visited California to interview potential arbitrators and to meet again with ESQ and its accountants. Birbrower had previously filed a

demand for arbitration against Tandem with the San Francisco offices of the American Arbitration Association (AAA). In August 1993, Hobbs returned to California to assist ESQ in settling the Tandem matter. While in California, Hobbs met with ESQ and its accountants to discuss a proposed settlement agreement Tandem authored. Hobbs also met with Tandem representatives to discuss possible changes in the proposed agreement. Hobbs gave ESQ legal advice during this trip, including his opinion that ESQ should not settle with Tandem on the terms proposed.

ESQ eventually settled the Tandem dispute, and the matter never went to arbitration. But before the settlement, ESQ and Birbrower modified the contingency fee agreement.[2] The modification changed the fee arrangement from contingency to fixed fee, providing that ESQ would pay Birbrower over $1 million. The original contingency fee arrangement had called for Birbrower to receive "one-third (1/3) of all sums received for the benefit of the Clients . . . whether obtained through settlement, motion practice, hearing, arbitration, or trial by way of judgment, award, settlement, or otherwise. . . ."

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[2] Birbrower's brief refers to the "Fee Agreement" without specifying whether it means the original contingency agreement or the later modified fixed fee agreement. The operative fee agreement that would be enforced is in dispute, and, as explained below, is subject to clarification on remand. To avoid confusion, we simply refer to one "fee agreement" for purposes of our analysis.

In January 1994, ESQ sued Birbrower for legal malpractice and related claims in Santa Clara County Superior Court. Birbrower removed the matter to federal court and filed a counterclaim, which included a claim for attorney fees for the work it performed in both California and New York. The matter was then remanded to the superior court. There ESQ moved for summary judgment and/or adjudication on the first through fourth causes of action of Birbrower's counterclaim, which asserted ESQ and its representatives breached the fee agreement. ESQ argued that by practicing law without a license in California and by failing to associate legal counsel while doing so, Birbrower violated section 6125, rendering the fee agreement unenforceable. Based on these undisputed facts, the Santa Clara Superior Court granted ESQ's motion for summary adjudication of the first through fourth causes of action in Birbrower's counterclaim. The court also granted summary adjudication in favor of ESQ's third and fourth causes of action in its second amended complaint, seeking declaratory-relief as to the validity of the fee agreement and its modification. The court concluded that: (1) Birbrower was "not admitted to the practice of law in California"; (2) Birbrower "did not associate California counsel";[3] (3) Birbrower "provided legal services in this state"; and (4) "The law is clear that no one may recover compensation for services as an attorney in this state unless he or she was a member of the state bar at the time those services were performed."

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[3] Contrary to the trial court's implied assumption, no statutory exception to section 6125 allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar.

Although the trial court's order stated that the fee agreements were unenforceable, at the hearing on the summary adjudication motion, the trial court also observed: "It seems to me that those are some of the issues that this Court has to struggle with, and then it becomes a question of if they aren't allowed to collect their attorney's fees here, I don't think that puts the attorneys in a position from being precluded from collecting all of their attorney's fees, only those fees probably that were generated by virtue of work that they performed in California and not that work that was performed in New York."

In granting limited summary adjudication, the trial court left open the following issues for resolution: ESQ's malpractice action against Birbrower, and the remaining causes of action in Birbrower's counterclaim, including Birbrower's fifth cause of action for quantum meruit (seeking the reasonable value of legal services provided).

Birbrower petitioned the Court of Appeal for a writ of mandate directing the trial court to vacate the summary adjudication order. The Court of Appeal denied Birbrower's petition and affirmed the trial court's order, holding that Birbrower violated section 6125. The Court of Appeal also concluded that Birbrower's violation barred the firm from recovering its legal fees under the written fee agreement, including fees generated in New York by the attorneys when they were physically present in New York, because the agreement included payment for California or "local" services for a California client in California. The Court of Appeal agreed with the trial court, however, in deciding that Birbrower could pursue

its remaining claims against ESQ, including its equitable claim for recovery of its fees in quantum meruit.

We granted review to determine whether Birbrower's actions and services performed while representing ESQ in California constituted the unauthorized practice of law under section 6125 and, if so, whether a section 6125 violation rendered the fee agreement wholly unenforceable.

II. DISCUSSION

A. The Unauthorized Practice of Law

The California Legislature enacted section 6125 in 1927 as part of the State Bar Act (the Act), a comprehensive scheme regulating the practice of law in the state. (*J.W. v. Superior Court* (1993) 17 Cal.App.4th 958, 965 (*J.W.*).) Since the Act's passage, the general rule has been that, although persons may represent themselves and their own interests regardless of State Bar membership, no one but an active member of the State Bar may practice law for another person in California. (*Ibid.*) The prohibition against unauthorized law practice is within the state's police power and is designed to ensure that those performing legal services do so competently. (*Id.* at p. 969.)

A violation of section 6125 is a misdemeanor. (§ 6126.) Moreover, "No one may recover compensation for services as an attorney at law in this state unless [the person] was at the time the services were performed a member of The State Bar." (*Hardy v. San Fernando Valley C. of C.* (1950) 99 Cal.App.2d 572, 576, 222 P.2d 314 (*Hardy*).)

Although the Act did not define the term "practice law," case law explained it as "the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure." (*People ex rel. Lawyers' Institute of San Diego v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535, 209 P. 363 (*Merchants*).) *Merchants* included in its definition legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation. (*Ibid.*; see *People v. Ring* (1937) 26 Cal.App.2d. Supp. 768, 772-773, 70 P.2d 281 (*Ring*) [holding that single incident of practicing law in state without a license violates § 6125]; see also *Mickel v. Murphy* (1957) 147 Cal.App.2d 718, 721, 305 P.2d 993 [giving of legal advice on matter not pending before state court violates § 6125], disapproved on other grounds in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 651, 320 P.2d 16.) *Ring* later determined that the Legislature "accepted both the definition already judicially supplied for the term and the declaration of the Supreme Court [in *Merchants*] that it had a sufficiently definite meaning to need no further definition. The definition . . . must be regarded as definitely establishing, for the jurisprudence of this state, the meaning of the term 'practice law.' " (*Ring, supra*, 26 Cal.App.2d Supp. at p. 772.)

In addition to not defining the term "practice law," the Act also did not define the meaning of "in California." In today's legal practice, questions often arise concerning whether the phrase refers to the nature of the legal services, or restricts the Act's application to those out-of-state attorneys who are physically present in the state.

Section 6125 has generated numerous opinions on the meaning of "practice law" but none on the meaning of "in California." In our view, the practice of law "in California" entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law "in California." The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.

Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. Physical presence here is one factor we may consider in deciding whether the unlicensed lawyer has violated section 6125, but it is by no means exclusive. For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person *automatically* practices law "in California" whenever that person practices California law anywhere, or "virtually" enters the state by telephone, fax, e-mail, or satellite. (See e.g., *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 543, 86 Cal.Rptr.

673, 469 P.2d 353 (*Baron*) ["practice law" does not encompass all professional activities].) Indeed, we disapprove *Ring, supra,* 26 Cal.App.2d Supp. 768, and its progeny to the extent the cases are inconsistent with our discussion. We must decide each case on its individual facts.

This interpretation acknowledges the tension that exists between interjurisdictional practice and the need to have a state-regulated bar. As stated in the American Bar Association Model Code of Professional Responsibility, Ethical Consideration EC 3-9, "Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice." (Fns. omitted.) *Baron* implicitly agrees with this canon. (*Baron, supra,* 2 Cal.3d at p. 543.)

If we were to carry the dissent's narrow interpretation of the term "practice law" to its logical conclusion, we would effectively limit section 6125's application to those cases in which nonlicensed out-of-state lawyers appeared in a California courtroom without permission.

(Dis. opn., *post*, 1998 Cal. LEXIS 2 at pp. *48.) Clearly, neither *Merchants, supra*, 189 Cal. at page 535, nor *Baron, supra*, 2 Cal.3d at page 543, supports the dissent's fanciful interpretation of the thoughtful guidelines announced in those cases. Indeed, the dissent's definition of "practice law" ignores *Merchants* altogether, and, in so doing, substantially undermines the Legislature's intent to protect the public from those giving unauthorized legal advice and counsel.

Exceptions to section 6125 do exist, but are generally limited to allowing out-of-state attorneys to make brief appearances before a state court or tribunal. They are narrowly drawn and strictly interpreted. For example, an out-of-state attorney not licensed to practice in California may be permitted, *by consent of a trial judge*, to appear in California in a particular pending action. (See *In re McCue* (1930) 211 Cal. 57, 67, 293 P. 47; 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 402, p. 493.)

In addition, with the permission of the California court in which a particular cause is pending, out-of-state counsel may appear before a court as counsel pro hac vice. (Cal. Rules of Court, rule 983.) A court will approve a pro hac vice application only if the out-of-state attorney is a member in good standing of another state bar and is eligible to practice in any United States court or the highest court in another jurisdiction. (Cal. Rules of Court, rule 983(a).) The out-of-state attorney must also associate an active member of the California Bar as attorney of record and is subject to the Rules of Professional Conduct of the State Bar. (Cal. Rules of Court, rules 983(a), (d); see Rules Prof. Conduct, rule 1-100(D)(2) [includes lawyers

from other jurisdictions authorized to practice in this state].)

The Act does not regulate practice before United States courts. Thus, an out-of-state attorney engaged to render services in bankruptcy proceedings was entitled to collect his fee. (*Cowen v. Calabrese* (1964) 230 Cal.App.2d 870, 872, 41 Cal.Rptr. 441 (*Cowen*); but see U.S. Dist. Ct. Local Rules, Northern Dist. Cal., rule 11-1(b); Eastern Dist. Cal., rule 83-180; Central Dist. Cal., rule 2.2.1; Southern Dist. Cal., rule 83.3(c)(1)(a) [today conditioning admission to their respective bars (with certain exceptions for some federal government employees) on active membership in good standing in California State Bar].)

Finally, California Rules of Court, rule 988, permits the State Bar to issue registration certificates to foreign legal consultants who may advise on the law of the foreign jurisdiction where they are admitted. These consultants may not, however, appear as attorneys before a California court or judicial officer or otherwise prepare pleadings and instruments in California or give advice on the law of California or any other state or jurisdiction except those where they are admitted.

The Legislature has recognized an exception to section 6125 in international disputes resolved in California under the state's rules for arbitration and conciliation of international commercial disputes. (Code Civ. Proc., § 1297.11 et seq.) This exception states that in a commercial conciliation in California involving international commercial disputes, "The parties may appear in person or be represented or assisted by any person of their choice. A person assisting or representing a party need

not be a member of the legal profession or licensed to practice law in California." (Code Civ. Proc., § 1297.351.) Likewise, the Act does not apply to the preparation of or participation in labor negotiations and arbitrations arising under collective bargaining agreements in industries subject to federal law. (See, e.g., *Teamsters Local v. Lucas Flour Co.* (1962) 369 U.S. 95, 103; see also *Labor-Management Relations Act of 1947*, 29 U.S.C. §§ 185(a).)

B. The Present Case

The undisputed facts here show that neither *Baron's* definition (*Baron, supra*, 2 Cal.3d at p. 543) nor our "sufficient contact" definition of "practice law in California" (*ante*, at p. 10) would excuse Birbrower's extensive practice in this state. Nor would any of the limited statutory exceptions to section 6125 apply to Birbrower's California practice. As the Court of Appeal observed, Birbrower engaged in unauthorized law practice *in California* on more than a limited basis, and no firm attorney engaged in that practice was an active member of the California State Bar. As noted (*ante*, 1998 Cal. LEXIS 2 at pp. *4-6), in 1992 and 1993, Birbrower attorneys traveled to California to discuss with ESQ and others various matters pertaining to the dispute between ESQ and Tandem. Hobbs and Condon discussed strategy for resolving the dispute and advised ESQ on this strategy. Furthermore, during California meetings with Tandem representatives in August 1992, Hobbs demanded Tandem pay $15 million, and Condon told Tandem he believed damages in the matter would exceed that amount if the parties proceeded to litigation. Also in California, Hobbs met with ESQ for the stated purpose of helping to reach a settlement agreement

and to discuss the agreement that was eventually proposed. Birbrower attorneys also traveled to California to initiate arbitration proceedings before the matter was settled. As the Court of Appeal concluded, " . . . the Birbrower firm's in-state activities clearly constituted the [unauthorized] practice of law" *in California.*

Birbrower contends, however, that section 6125 is not meant to apply to *any* out-of-state *attorneys.* Instead, it argues that the statute is intended solely to prevent nonattorneys from practicing law. This contention is without merit because it contravenes the plain language of the statute. Section 6125 clearly states that *no person* shall practice law in California unless that person is a member of the State Bar. The statute does not differentiate between attorneys or nonattorneys, nor does it excuse a person who is a member of another state bar. It is well settled that, in determining the meaning of a statute, we look to its words and give them their usual and ordinary meaning. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601, 828 P.2d 140; *Kimmel v. Goland* (1990) 51 Cal.3d 202, 208-209, 271 Cal.Rptr. 191, 793 P.2d 524.) "If statutory language is 'clear and unambiguous there is no need for construction, and courts should not indulge in it.' [Citation.]" (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 218, 188 Cal.Rptr. 115, 655 P.2d 317.) The plain meaning controls our interpretation of the statute here because Birbrower has not shown "that the natural and customary import of the statute's language is either 'repugnant to the general purview of the act' or for some other compelling reason, should be disregarded . . . . " (33 Cal.3d at pp. 218-219.)

Birbrower next argues that we do not further the statute's intent and purpose – to protect California citizens from incompetent attorneys – by enforcing it against out-of-state attorneys. Birbrower argues that because out-of-state attorneys have been licensed to practice in other jurisdictions, they have already demonstrated sufficient competence to protect California clients. But Birbrower's argument overlooks the obvious fact that other states' laws may differ substantially from California law. Competence in one jurisdiction does not necessarily guarantee competence in another. By applying section 6125 to out-of-state attorneys who engage in the extensive practice of law in California without becoming licensed in our state, we serve the statute's goal of assuring the competence of all attorneys practicing law in this state. (*J.W., supra,* 17 Cal.App.4th at p. 969.)

California is not alone in regulating who practices law in its jurisdiction. Many states have substantially similar statutes that serve to protect their citizens from unlicensed attorneys who engage in unauthorized legal practice. Like section 6125, these other state statutes protect local citizens "against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions." (*Spivak v. Sachs* (1965) 16 N.Y.2d 163 [211 N.E.2d 329, 331, 263 N.Y.S.2d 953].) Whether an attorney is duly admitted in another state and is, in fact, competent to practice in California is irrelevant in the face of section 6125's language and purpose. (See *Ranta v. McCarney* (N.D.1986) 391 N.W.2d 161, 163 (*Ranta*) [noting that out-of-state attorney's competence is irrelevant because purpose of North Dakota law

against unauthorized law practice is to assure competence *before* attorney practices in state].) Moreover, as the North Dakota Supreme Court pointed out in *Ranta*: "It may be that such an [out-of-state attorney] exception is warranted, but such a plea is more properly made to a legislative committee considering a bill enacting such an exception or to this court in its rule-making function than it is in a judicial decision." (*Id.* at p. 165.) Similarly, a decision to except out-of-state attorneys licensed in their own jurisdictions from section 6125 is more appropriately left to the California Legislature.

Assuming that section 6125 does apply to out-of-state attorneys not licensed here, Birbrower alternatively asks us to create an exception to section 6125 for work incidental to private arbitration or other alternative dispute resolution proceedings. Birbrower points to fundamental differences between private arbitration and legal proceedings, including procedural differences relating to discovery, rules of evidence, compulsory process, cross-examination of witnesses, and other areas. (See *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 57-58, 39 L.Ed.2d 147, 94 S.Ct. 1011 [illustrating differences between arbitration and court proceedings].) As Birbrower observes, in light of these differences, at least one court has decided that an out-of-state attorney could recover fees for services rendered in an arbitration proceeding. (See *Williamson v. John D. Quinn Const. Corp.* (S.D.N.Y. 1982) 537 F.Supp. 613, 616 (*Williamson*).)

In *Williamson*, a New Jersey law firm was employed by a client's New York law firm to defend a construction contract arbitration in New York. It sought to recover fees solely related to the arbitration proceedings, even though

the attorney who did the work was not licensed in New York, nor was the firm authorized to practice in the state. (*Williamson, supra*, 537 F.Supp. at p. 616.) In allowing the New Jersey firm to recover its arbitration fees, the federal district court concluded that an arbitration tribunal is not a court of record, and its factfinding process is not similar to a court's process. (*Ibid.*) The court relied on a local state bar report concluding that representing a client in an arbitration was not the unauthorized practice of law. (*Ibid.*; see Com. Rep., Labor Arbitration and the Unauthorized Practice of Law (May/June 1975) 30 Record of the Association of the Bar of the City of New York, No. 5/6) But as amicus curiae the State Bar of California observes, "While in *Williamson* the federal district court did allow the New Jersey attorneys to recover their fees, that decision clearly is distinguishable on its facts. . . . [P] In the instant case, it is undisputed that none of the time that the New York attorneys spent in California was" spent in arbitration; *Williamson* thus carries limited weight. (See also *Moore v. Conliffe* (1994) 7 Cal.4th 634, 637-638, 871 P.2d 204 [private AAA arbitration functionally equivalent to judicial proceeding to which litigation privilege applies].) Birbrower also relies on California's rules for arbitration and conciliation of international commercial disputes for support. (Code Civ. Proc., § 1297.11 et seq.) As noted (*ante*, at 1998 Cal. LEXIS 2 at p. *18), these rules specify that, in an international commercial conciliation or arbitration proceeding, the person representing a party to the conciliation or arbitration is not required to be a licensed member of the State Bar. (Code Civ. Proc., § 1297.351.)

We decline Birbrower's invitation to craft an arbitration exception to section 6125's prohibition of the unlicensed practice of law in this state. Any exception for arbitration is best left to the Legislature, which has the authority to determine qualifications for admission to the State Bar and to decide what constitutes the practice of law. (*Baron, supra*, 2 Cal.3d at pp. 540-541; see also *Eagle Indem. Co. v. Industrial Acc. Com.* (1933) 217 Cal. 244, 247, 18 P.2d 341.) Even though the Legislature has spoken with respect to *international* arbitration and conciliation, it has not enacted a similar rule for private arbitration proceedings. Of course, private arbitration and other alternative dispute resolution practices are important aspects of our justice system. (See *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9, 832 P.2d 899 [noting a strong public policy in favor of arbitration].) Section 6125, however, articulates a strong public policy favoring the practice of law in California by licensed State Bar members. In the face of the Legislature's silence, we will not create an arbitration exception under the facts presented. (See *Baron, supra*, 2 Cal.3d at pp. 540-541 [membership, character, and conduct of attorneys is proper subject of state legislative regulation and control].)[4]

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[4] The dissent focuses on an arbitrator's powers in an attempt to justify its conclusion that an out-of-state attorney may engage in the unlicensed representation of a client in an arbitration proceeding. (See dis. opn. *post*, at 1998 Cal. LEXIS 2 at pp. 54-55.) This narrow focus confuses the issue here. An arbitrator's powers to enforce a contract or "award an essentially unlimited range of remedies" has no bearing on the question whether unlicensed out-of-state attorneys may represent California clients in an arbitration proceeding. (Dis. opn., *post*, at 1998 Cal. LEXIS 2 at p. 54.) Moreover, any

In its reply brief to the State Bar's amicus curiae brief, Birbrower raises for the first time the additional argument that the Federal Arbitration Act (FAA) preempted the rules governing the AAA proposed arbitration and section 6125. The FAA regulates arbitration that deals with maritime transactions and contracts involving the transportation of goods through interstate or foreign commerce. (9 U.S.C. § 1 et seq.) Although we need not address the question under California Rules of Court, rule 29(b)(1), and note the parties' settlement agreement rendered the arbitration unnecessary, we reject the argument for its lack of merit. First, the parties incorporated a California choice-of-law provision in the Tandem Agreement, indicating they intended to apply California law in any necessary arbitration, and they have not shown that California law in any way conflicts with the FAA. Moreover, in interpreting the California Arbitration Act stay provisions (Code Civ. Proc., § 1281.2, subd. (c)), the high court observed that the FAA does not contain an express preemptive provision, nor does it "reflect a congressional intent to occupy the entire field of arbitration." (*Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 477, 109 S.Ct. 1248, 103 L.Ed.2d 488.)

Finally, Birbrower urges us to adopt an exception to section 6125 based on the unique circumstances of this case. Birbrower notes that "Multistate relationships are a

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discussion of the practice of law in an arbitration proceeding is irrelevant here because the parties settled the underlying case before arbitration proceedings became necessary. Nonetheless, we emphasize that, in the absence of clear legislative direction, we decline to create an exception allowing unlicensed legal practice in arbitration in violation of section 6125.

common part of today's society and are to be dealt with in commonsense fashion." (*In re Estate of Waring* (1966) 47 N.J. 367 [221 A.2d 193, 197].) In many situations, strict adherence to rules prohibiting the unauthorized practice of law by out-of-state attorneys would be " 'grossly impractical and inefficient.' " (*Ibid.*; see also *Appell v. Reiner* (1964) 43 N.J. 313 [204 A.2d 146, 148] [strict adherence to rule barring out-of-state lawyers from representing New Jersey residents on New Jersey matters may run against the public interest when case involves inseparable multistate transactions].)

Although, as discussed (*ante*, 1998 Cal. LEXIS 2 at pp. *16-18), we recognize the need to acknowledge and, in certain cases, accommodate the multistate nature of law practice, the facts here show that Birbrower's extensive activities within California amounted to considerably more than any of our state's recognized exceptions to section 6125 would allow. Accordingly, we reject Birbrower's suggestion that we except the firm from section 6125's rule under the circumstances here.

C. Compensation for Legal Services

Because Birbrower violated section 6125 when it engaged in the unlawful practice of law in California, the Court of Appeal found its fee agreement with ESQ unenforceable in its entirety. Without crediting Birbrower for some services performed in New York, for which fees were generated under the fee agreement, the court reasoned that the agreement was void and unenforceable because it included payment for services rendered to a California client in the state by an unlicensed out-of-state

lawyer. The court opined that "When New York counsel decided to accept [the] representation, it should have researched California law, including the law governing the practice of law in this state." The Court of Appeal let stand, however, the trial court's decision to allow Birbrower to pursue its fifth cause of action in quantum meruit.[5] We agree with the Court of Appeal to the extent it barred Birbrower from recovering fees generated under the fee agreement for the unauthorized legal services it performed in California. We disagree with the same court to the extent it implicitly barred Birbrower from recovering fees generated under the fee agreement for the limited legal services the firm performed in New York.

It is a general rule that an attorney is barred from recovering compensation for services rendered in another state where the attorney was not admitted to the bar. (Annot., Right of Attorney Admitted in One State to Recover Compensation for Services Rendered in Another State Where He Was Not Admitted to the Bar (1967) 11 A.L.R.3d 907; *Hardy, supra*, 99 Cal.App.2d at p. 576.) The general rule, however, has some recognized exceptions.

Initially, Birbrower seeks enforcement of the entire fee agreement, relying first on the federal court exception discussed *ante*, at 1998 Cal. LEXIS 2 page *17. (*Cowen, supra*, 230 Cal.App.2d at p. 872; *In re McCue, supra*, 211 Cal. at p. 66; see Annot., *supra*, 11 A.L.R.3d at pp. 912-913

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[5] We observe that ESQ did not seek (and thus the court did not grant) summary adjudication on the Birbrower firm's quantum meruit claim for the reasonable value of services rendered. Birbrower thus still has a cause of action pending in quantum meruit.

[citing Cowen as exception to general rule of nonrecovery].) This exception does not apply in this case; none of Birbrower's activities related to federal court practice.

A second exception on which Birbrower relies to enforce its entire fee agreement relates to "Services not involving courtroom appearance." (Annot., *supra*, 11 A.L.R.3d at p. 911 [*citing Wescott v. Baker* (N.J. 1912) 83 N.J.L. 460, 85 A. 315].) California has implicitly rejected this broad exception through its comprehensive definition of what it means to "practice law." Thus, the exception Birbrower seeks for all services performed outside the courtroom in our state is too broad under section 6125.

Some jurisdictions have adopted a third exception to the general rule of nonrecovery for in-state services, if an out-of-state attorney "makes a full disclosure to his client of his lack of local license and does not conceal or misrepresent the true facts." (Annot., *supra*, 11 A.L.R.3d at p. 910.) For example, in *Freeling v. Tucker* (Idaho 1930) 49 Idaho 475, 289 P. 85, the court allowed an Oklahoma attorney to recover for services rendered in an Idaho probate court. Even though an Idaho statute prohibited the unlicensed practice of law, the court excused the Oklahoma attorney's unlicensed representation because he had not falsely represented himself nor deceptively held himself out to the client as qualified to practice in the jurisdiction. (289 P. at p. 86.) In this case, Birbrower alleges that ESQ at all times knew that the firm was not licensed to practice law in California. Even assuming that is true, however, we reject the full disclosure exception for the same reasons we reject the argument that section 6125 is not meant to apply to nonattorneys. Recognizing

these exceptions would contravene not only the plain language of section 6125 but the underlying policy of assuring the competence of those practicing law in California.

Therefore, as the Court of Appeal held, none of the exceptions to the general rule prohibiting recovery of fees generated by the unauthorized practice of law apply to Birbrower's activities in California. Because Birbrower practiced substantial law in this state in violation of section 6125, it cannot receive compensation under the fee agreement for any of the services it performed in California. Enforcing the fee agreement in its entirety would include payment for the unauthorized practice of law in California and would allow Birbrower to enforce an illegal contract. (*See Hardy, supra,* 99 Cal.App.2d at p. 576.)

Birbrower asserts that even if we agree with the Court of Appeal and find that none of the above exceptions allowing fees for unauthorized California services apply to the firm, it should be permitted to recover fees for those limited services it performed exclusively *in New York* under the agreement. In short, Birbrower seeks to recover under its contract for those services it performed for ESQ in New York that did not involve the practice of law in California, including fee contract negotiations and some corporate case research. Birbrower thus alternatively seeks reversal of the Court of Appeal's judgment to the extent it implicitly precluded the firm from seeking fees generated in New York under the fee agreement.

We agree with Birbrower that it may be able to recover fees under the fee agreement for the limited legal

services it performed for ESQ in New York to the extent they did not constitute practicing law in California, even though those services were performed for a California client. Because section 6125 applies to the practice of law in California, it does not, in general, regulate law practice in other states. (See *ante*, 1998 Cal. LEXIS 2 at pp. *13-20.) Thus, although the general rule against compensation to out-of-state attorneys precludes Birbrower's recovery under the fee agreement for its actions in California, the severability doctrine may allow it to receive its New York fees generated under the fee agreement, if we conclude the illegal portions of the agreement pertaining to the practice of law in California may be severed from those parts regarding services Birbrower performed in New York. (See Annot., *supra*, 11 A.L.R.3d at pp. 908-909 and cases cited [bar on recovery by out-of-state attorney extends only to compensation for local services]; see also *Ranta, supra*, 391 N.W.2d at p. 166 [remanding case to determine which fees related to practice locally and which related to attorney's work in state where he was licensed].)

The law of contract severability is stated in Civil Code section 1599, which defines partially void contracts: "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." In *Calvert v. Stoner* (1948) 33 Cal.2d 97, 199 P.2d 297 (*Calvert*), we considered whether a contingent fee contract containing a provision restricting a party's right to compromise a suit without her attorney's consent was void entirely or severable in part. (*Id.* at p. 103.) We observed that "It is unnecessary . . . to determine

whether the particular provision is invalid as against public policy. It is sufficient to observe, assuming such invalidity, that in this state . . . the compensation features of the contract are not thereby deemed affected if in other respects the contract is lawful." (*Id.* at p. 104.) Calvert concluded that the invalid provision preventing the client from compromising the suit could be severed from the valid provision for attorney fees. (*Ibid.*)

The fee agreement between Birbrower and ESQ became illegal when Birbrower performed legal services in violation of section 6125. It is true that courts will not ordinarily aid in enforcing an agreement that is either illegal or against public policy. (*Asdourian v. Araj* (1985) 38 Cal.3d 276, 291, 211 Cal.Rptr. 703, 696 P.2d 95; *Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1109-1110, 260 Cal.Rptr. 6.) Illegal contracts, however, will be enforced under certain circumstances, such as when only a part of the consideration given for the contract involves illegality. In other words, notwithstanding an illegal consideration, courts may sever the illegal portion of the contract from the rest of the agreement. (*Keene v. Harling* (1964) 61 Cal.2d 318, 320, 38 Cal.Rptr. 513, 392 P.2d 273 (*Keene*).) " ' "When the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the Courts will make the distinction, for the . . . law . . . [divides] according to common reason; and having made that void that is against law, lets the rest stand. . . . " ' " (61 Cal.2d at pp. 320-321, *quoting Jackson v. Shawl* (1865) 29 Cal. 267, 272.) If the court is unable to distinguish between the lawful and unlawful parts of the agreement, "the illegality taints the entire

contract, and the entire transaction is illegal and unenforceable." (*Keene, supra,* 61 Cal.2d at p. 321.)

In *Keene,* the defendant agreed to pay the plaintiffs $50,000 in exchange for their business involving coin-operated machines. The defendant defaulted on his payments, and the plaintiffs sued. The defendant argued that the sales agreement was void because part of the sale involved machines that were illegal under a California penal statute. The court affirmed the lower court's determination that the price of the illegal machines could be deducted from the amount due on the original contract. "Since the consideration on the buyer's side was money, the court properly construed the contract by equating the established market price of the illegal machines to a portion of the money consideration." (*Keene, supra,* 61 Cal.2d at p. 323.) Thus, even though the entire contract was for a fixed sum, the court was able to value the illegal portion of the contract and separate it from the rest of the amount due under the agreement.

In this case, the parties entered into a contingency fee agreement followed by a fixed fee agreement.[6] ESQ was

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[6] The parties apparently do not dispute that they modified the original contingency fee arrangement to call for a fixed fee payment of over $1 million. They dispute, however, whether the original contingency fee arrangement became operative once again when ESQ failed to make a payment to Birbrower under the fixed fee arrangement. Because the trial court and the Court of Appeal believed the fee agreements to be unenforceable in their entirety, neither court addressed issues relating to the fee agreements themselves or the parties' disputes surrounding those agreements. We agree with the Court of Appeal that issues surrounding the two fee agreements and the applicability of

to pay money to Birbrower in exchange for Birbrower's legal services. The object of their agreement may not have been entirely illegal, assuming ESQ was to pay Birbrower compensation based in part on work Birbrower performed in New York that did not amount to the practice of law in California. The illegality arises, instead, out of the amount to be paid to Birbrower, which, if paid fully, would include payment for services rendered in California in violation of section 6125.

Therefore, we conclude the Court of Appeal erred in determining that the fee agreement between the parties was entirely unenforceable because Birbrower violated section 6125's prohibition against the unauthorized practice of law in California. Birbrower's statutory violation may require exclusion of the portion of the fee attributable to the substantial illegal services, but that violation does not necessarily entirely preclude its recovery under the fee agreement for the limited services it performed outside California. (*Calvert, supra,* 33 Cal.2d at pp. 104-105.)

Thus, the portion of the fee agreement between Birbrower and ESQ that includes payment for services rendered in New York may be enforceable to the extent that the illegal compensation can be severed from the rest of the agreement. On remand, therefore, the trial court must first resolve the dispute surrounding the parties' fee

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either section 6147 (regulating contents of contingency fee agreements) or the State Bar Rules of Professional Conduct, rules 3-300 and 4-200 (governing fees for legal services), are best resolved by the trial court on remand.

agreement and determine whether their agreement conforms to California law. If the parties and the court resolve the fee dispute and determine that one fee agreement is operable and does not violate any state drafting rules, the court may sever the illegal portion of the consideration (the value of the California services) from the rest of the fee agreement. Whether the trial court finds the contingent fee agreement or the fixed fee agreement to be valid, it will determine whether some amount is due under the valid agreement. The trial court must then determine, on evidence the parties present, how much of this sum is attributable to services Birbrower rendered in New York. The parties may then pursue their remaining claims.

III. DISPOSITION

We conclude that Birbrower violated section 6125 by practicing law in California. To the extent the fee agreement allows payment for those illegal local services, it is void, and Birbrower is not entitled to recover fees under the agreement for those services. The fee agreement is enforceable, however, to the extent it is possible to sever the portions of the consideration attributable to Birbrower's services illegally rendered in California from those attributable to Birbrower's New York services. Accordingly, we affirm the Court of Appeal judgment to the extent it concluded that Birbrower's representation of ESQ in California violated section 6125, and that Birbrower is not entitled to recover fees under the fee agreement for its local services. We reverse the judgment to the extent the court did not allow Birbrower to argue

in favor of a severance of the illegal portion of the consideration (for the California fees) from the rest of the fee agreement, and remand for further proceedings consistent with this decision.

CHIN, J.

WE CONCUR:

GEORGE, C.J.

MOSK, J.

BAXTER, J.

WERDEGAR, J.

BROWN, J.

DISSENT BY: KENNARD

DISSENT: DISSENTING OPINION BY KENNARD, J.

In California, it is a misdemeanor to practice law when one is not a member of the State Bar. (Bus. & Prof.Code, §§ 6125, 6126, subd. (a).) In this case, New York lawyers who were not members of the California Bar traveled to this state on several occasions, attempting to resolve a contract dispute between their clients and another corporation through negotiation and private arbitration. Their clients included a New York corporation and a sister corporation incorporated in California; the lawyers had in previous years represented the principal owners of these corporations. The majority holds that the New York lawyers' activities in California constituted the unauthorized practice of law. I disagree.

The majority focuses its attention on the question of whether the New York lawyers had engaged in the practice of law *in California*, giving scant consideration to a decisive preliminary inquiry: whether, through their activities here, the New York lawyers had engaged in the practice of law *at all*. In my view, the record does not show that they did. In reaching a contrary conclusion, the majority relies on an overbroad definition of the term "practice of law." I would adhere to this court's decision in *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 86 Cal.Rptr. 673, 469 P.2d 353, more narrowly defining the practice of law as the representation of another in a judicial proceeding or an activity requiring the application of that degree of legal knowledge and technique possessed only by a trained legal mind. Under this definition, this case presents a triable issue of material fact as to whether the New York lawyers' California activities constituted the practice of law.

I

Defendant Birbrower, Montalbano, Condon & Frank (hereafter Birbrower) is a New York law firm. Its lawyers are not licensed to practice law in California.

Kamal Sandhu was the sole shareholder of ESQ Business Services Inc., a New York corporation (hereafter ESQ-NY), of which his brother Iqbal Sandhu was the vice-president. Beginning in 1986, Birbrower lawyers represented the Sandhu family in various business matters. In 1990, Kamal Sandhu asked Birbrower lawyer Kevin Hobbs to review a proposed software development and marketing agreement between ESQ-NY and Tandem

Computers (hereafter Tandem). The agreement granted Tandem worldwide distribution rights to computer software created by ESQ-NY. The agreement also provided that it would be governed by California law and that, according to Birbrower's undisputed assertion, disputes were to be resolved by arbitration under the rules of the American Arbitration Association. ESQ-NY and Tandem signed the agreement.

Thereafter, a second corporation, also named ESQ Business Services, Inc. (hereafter ESQ-CAL), was incorporated in California, with Iqbal Sandhu as a principal shareholder. In 1991, ESQ-CAL consulted Birbrower lawyers concerning Tandem's performance under the agreement. In 1992, ESQ-NY and ESQ-CAL jointly hired Birbrower to resolve the dispute with Tandem, including the investigation and prosecution of claims against Tandem if necessary. ESQ-NY and ESQ-CAL entered into a contingency fee agreement with Birbrower; this agreement was executed in New York but was later modified to a fixed fee agreement in California.

The efforts of the Birbrower lawyers to resolve the dispute with Tandem included several brief trips to California. On these trips, Birbrower lawyers met with officers of both ESQ-NY and ESQ-CAL and with representatives of Tandem; they also interviewed arbitrators and participated in negotiating the settlement of the dispute with Tandem. (Maj. opn., *ante*, at pp. 3-4.) On February 12, 1993, Birbrower initiated an arbitration proceeding against Tandem, on behalf of both ESQ-NY and ESQ-CAL, by filing a claim with the American Arbitration Association in San Francisco, California. Before an

arbitration hearing was held, the dispute with Tandem was settled.

In January 1994, ESQ-CAL and Iqbal Sandhu, the principal shareholder, sued Birbrower for malpractice. Birbrower cross-complained to recover its fees under the fee agreement. Plaintiffs ESQ-CAL and Iqbal Sandhu thereafter amended their complaint to add ESQ-NY as a plaintiff. Plaintiffs moved for summary adjudication, asserting the fee agreement was unenforceable because the Birbrower lawyers had engaged in the unauthorized practice of law in California. The trial court agreed, and granted plaintiffs' motion. The Court of Appeal upheld the trial court's ruling, as does a majority of this court today.

II

Business and Professions Code section 6125 states: "No person shall practice law in California unless the person is an active member of the State Bar." The Legislature, however, has not defined what constitutes the practice of law.

Pursuant to its inherent authority to define and regulate the practice of law (see, e.g., *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 728, 147 Cal.Rptr. 631, 581 P.2d 636; *In re Lavine* (1935) 2 Cal.2d 324, 328, 41 P.2d 161; *People v. Turner* (1850) 1 Cal. 143, 150), this court in 1922 defined the practice of law as follows: " 'As the term is generally understood, the practice of the law is the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted

rules of procedure. But in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which the legal rights are secured although such matter may or may not be depending in a court.' " (*People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535, 209 P. 363 (*Merchants*).) The Merchants court adopted this definition verbatim from a decision by the Indiana Court of Appeal, *Eley v. Miller* (1893) 7 Ind.App. 529, 34 N.E. 836, 837-838. (*Merchants, supra,* at p. 535.)

In 1970, in *Baron v. City of Los Angeles, supra,* 2 Cal.3d 535, 542 (*Baron*), this court reiterated the *Merchants* court's definition of the term "practice of law." We were quick to point out in *Baron,* however, that "ascertaining whether a particular activity falls within this general definition may be a formidable endeavor." (2 Cal.3d at p. 543.) *Baron* emphasized "that it is not the whole spectrum of professional services of lawyers with which the State Bar Act is most concerned, but rather it is the smaller area of activities defined as the 'practice of law.' " (*Ibid.*) It then observed: "In close cases, the courts have determined that the resolution of legal questions for another by advice and action is practicing law 'if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a *trained legal mind.*' [Citations.]" (*Ibid.*, italics added.) *Baron* added that "if the application of legal knowledge and technique is required, the activity constitutes the practice of law. . . . " (*Ibid.*, italics added.) This definition is quite similar to that proposed by Cornell Law School Professor Charles Wolfram, the Chief Reporter for the American Law Institute's Restatement of the Law Governing Lawyers: "The correct form of the test [for the practice of law] should

inquire whether the matter handled was of such complexity that only a person trained as a lawyer should be permitted to deal with it." (Wolfram, Modern Legal Ethics (1986) p. 836.)

The majority asserts that the definition of practice of law I have stated above misreads this court's opinion in *Baron*. (Maj. opn., *ante*, 1998 Cal. LEXIS 2 at p. *15-16.) But what the majority characterizes as "the dissent's fanciful interpretation of the [Baron court's] thoughtful guidelines" (maj. opn., *ante*, 1998 Cal. LEXIS 2 at p. *15) consists of language I have quoted directly from *Baron*.

The majority also charges that the narrowing construction of the term "practice of law" that this court adopted in *Baron* "effectively limits section 6125's application to those cases in which nonlicensed out-of-state lawyers appeared in a California courtroom without permission." (Maj. opn., *ante*, 1998 Cal. LEXIS 2 at p. *15.) Fiddlesticks. Because the *Baron* definition encompasses all activities that "reasonably demand application of a trained legal mind" (*Baron, supra*, 2 Cal.3d at p. 543), the majority's assertion would be true only if there were no activities, apart from court appearances, requiring application of a trained legal mind. Many attorneys would no doubt be surprised to learn that, for example, drafting testamentary documents for large estates, preparing merger agreements for multinational corporations, or researching complex legal issues are not activities that require a trained legal mind.

According to the majority, use of the *Baron* definition I have quoted would undermine protection of the public from incompetent legal practitioners. (Maj. opn., *ante*,

1998 Cal. LEXIS 2 at p. *15.) The *Baron* definition provides ample protection from incompetent legal practitioners without infringing upon the public's interest in obtaining advice and representation from other professionals, such as accountants and real estate brokers, whose skills in specialized areas may overlap with those of lawyers. This allows the public the freedom to choose professionals who may be able to provide the public with needed services at a more affordable cost. (See Wolfram, Modern Legal Ethics, *supra*, at p. 831; Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions* (1981) 34 Stan.L.Rev. 1, 97-98; Weckstein, *Limitations on the Right to Counsel: The Unauthorized Practice of Law*, 1978 Utah L.Rev. 649, 650.) As this court has recognized, there are proceedings in which nonattorneys "are competent" to represent others without undermining the protection of the public interest. (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 913-914, 160 Cal.Rptr. 124, 603 P.2d 41.)

The majority, too, purports to apply the definition of the practice of law as articulated in *Baron*, *supra*, 2 Cal.3d 535. The majority, however, focuses only on *Baron's* quotation of the general definition of the practice of law set forth in *Merchants*, *supra*, 189 Cal. 531, 535. The majority ignores both the ambiguity in the *Merchants* definition and the manner in which *Baron* resolved that ambiguity. The majority apparently views the practice of law as encompassing *any* "legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation." (Maj. opn., *ante*, 1998 Cal. LEXIS 2 at p. *11.)

The majority's overbroad definition would affect a host of common commercial activities. On point here are comments that Professor Deborah Rhode made in a 1981 article published in the Stanford Law Review: "For many individuals, most obviously accountants, bankers, real estate brokers, and insurance agents, it would be impossible to give intelligent counsel without reference to legal concerns that such statutes reserve as the exclusive province of lawyers. As one [American Bar Association] official active in unauthorized practice areas recently acknowledged, there is growing recognition that ' "all kinds of other professional people are practicing the law almost out of necessity." ' Moreover, since most legislation does not exempt gratuitous activity, much advice commonly imparted by friends, employers, political organizers, and newspaper commentators constitutes unauthorized practice. For example, although the organized bar has not yet evinced any inclination to drag [nationally syndicated advice columnist] Ann Landers through the courts, she is plainly fair game under extant statutes [proscribing the unauthorized practice of law]." (Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, *supra*, 34 Stan.L.Rev. at p. 47, fns. omitted.)

Unlike the majority, I would for the reasons given above adhere to the more narrowly drawn definition of the practice of law that this court articulated in *Baron*, *supra*, 2 Cal.3d 535, 543: the representation of another in a judicial proceeding or an activity requiring the application of that degree of legal knowledge and technique possessed only by a trained legal mind. Applying that definition here, I conclude that the trial court should not

have granted summary adjudication for plaintiffs based on the Birbrower lawyers' California activities. That some or all of those activities related to arbitration does not necessarily establish that they constituted the practice of law, as I shall explain.

III

As I mentioned earlier, Birbrower's clients had a software development and marketing agreement with Tandem. The agreement provided that its validity, interpretation, and enforcement were to be governed by California law. It also contained an arbitration provision. After a dispute arose pertaining to Tandem's performance under the agreement, Birbrower initiated an arbitration on behalf of its clients by filing a claim with the American Arbitration Association in San Francisco, and held meetings in California to prepare for an arbitration hearing. Because the dispute with Tandem was settled, the arbitration hearing was never held.

As I explained in part II, *ante*, this court in *Baron*, *supra*, 2 Cal.3d 535, 543, defined the term "practice of law" in narrower terms than the court had done earlier in *Merchants*, *supra*, 189 Cal. 531, 535, which simply adopted verbatim the general definition set forth in an 1893 decision of the Indiana Court of Appeal. Under the narrower definition articulated in *Baron*, the practice of law is the representation of another in a judicial proceeding or an activity requiring the application of that degree of legal knowledge and technique possessed only by a trained legal mind.

Representing another in an arbitration proceeding does not invariably present difficult or doubtful legal questions that require a trained legal mind for their resolution. Under California law, arbitrators are "not ordinarily constrained to decide according to the rule of law. . . . " (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11, 832 P.2d 899.) Thus, arbitrators, " 'unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action.' [Citations.]" (3 Cal. 4th at pp. 10-11.) They " 'are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good].' [Citation.]" (*Id.* at p. 11 brackets in original.) For this reason, "the existence of an *error of law* apparent on the face of the [arbitration] award *that causes substantial injustice* does not provide grounds for judicial review." (*Id.* at p. 33 italics added; contra, 3 Cal. 4th at pp. 33-40 (conc. and dis. opn. of Kennard, J.).)

Moreover, an arbitrator in California can award any remedy "arguably based" on "the contract's general subject matter, framework or intent." (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 381, 885 P.2d 994.) This means that "an arbitrator in a commercial contract dispute may award an essentially unlimited range of remedies, whether or not a court could award them if it decided the same dispute, so long as it can be said that the relief draws its 'essence' from the contract and not some other source." (*Id.* at p. 391 (dis. opn. of Kennard, J.).)

To summarize, under this court's decisions, arbitration proceedings are not governed or constrained by the rule of law; therefore, representation of another in an arbitration proceeding, including the activities necessary to prepare for the arbitration hearing, does not necessarily require a trained legal mind.

Commonly used arbitration rules further demonstrate that legal training is not essential to represent another in an arbitration proceeding. Here, for example, Birbrower's clients agreed to resolve any dispute arising under their contract with Tandem using the American Arbitration Association's rules, which allow any party to be "represented by counsel *or other authorized representative.*" (Am. Arbitration Assn., Com. Arbitration Rules (July 1, 1996) § 22, italics added.) Rules of other arbitration organizations also allow for representation by nonattorneys. For instance, the Rules of Procedure of the Inter-American Commercial Arbitration Commission, article IV provides: "The parties may be represented or assisted by persons of their choice." By federal law, this rule applies in all arbitrations between a United States citizen and a citizen of another signatory to the Inter-American Convention on International Commercial Arbitration, unless the arbitrating parties have expressly provided otherwise. (9 U.S.C. § 303(b); Inter-Am. Convention on International Com. Arbitration, art. 3.)

The American Arbitration Association and other major arbitration associations thus recognize that nonattorneys are often better suited than attorneys to represent parties in arbitration. The history of arbitration also reflects this reality, for in its beginnings arbitration was a dispute-resolution mechanism principally used in a few

specific trades (such as construction, textiles, ship chartering, and international sales of goods) to resolve disputes among businesses that turned on factual issues uniquely within the expertise of members of the trade. In fact, "rules of a few trade associations forbid representation by counsel in arbitration proceedings, because of their belief that it would complicate what might otherwise be simple proceedings." (Grenig, Alternative Dispute Resolution (1997) § 5.2, p. 81.) The majority gives no adequate justification for its decision to deprive parties of their freedom of contract and to make it a crime for anyone but California lawyers to represent others in arbitrations in California.

In addressing an issue similar to that presented here, a federal court held that a firm of New Jersey lawyers not licensed to practice law in New York was entitled to recover payment for legal services rendered in a New York arbitration proceeding. (*Williamson v. John D. Quinn Const. Corp.* (S.D.N.Y. 1982) 537 F.Supp. 613 (*Williamson*).) In allowing recovery of fees, the court cited a report by the Association of the Bar of The City of New York: "The report states, 'it should be noted that no support has to date been found in judicial decision, statute or ethical code for the proposition that representation of a party in any kind of arbitration amounts to the practice of law.' The report concludes 'the Committee is of the opinion that representation of a party in an arbitration proceeding by a nonlawyer or a lawyer from another jurisdiction is not the unauthorized practice of law.' " (*Id.* at p. 616, quoting Com. Rep., Labor Arbitration and the Unauthorized Practice of Law (May/June 1975) 30 Record

of the Association of the Bar of The City of New York, No. 5/6.)

The majority's attempt to distinguish *Williamson, supra,* 537 F.Supp. 613 from this case is unpersuasive. The majority points out that in *Williamson,* the lawyers of the New Jersey firm actually rendered services at the New York arbitration hearing, whereas here the New York lawyers never actually appeared at an arbitration hearing in California. (Maj. opn., *ante,* at pp. 19, 20, fn. 4.) The majority distinguishes *Williamson* on the ground that in this case no arbitration hearing occurred. Does the majority mean that an actual appearance at an arbitration hearing is not the practice of law, but that preparation for arbitration proceedings is?

In this case, plaintiffs have not identified any specific California activities by the New York lawyers of the Birbrower firm that meet the narrow definition of the term "practice of law" as articulated by this court in *Baron, supra,* 2 Cal. 3d 535, 543. Accordingly, I would reverse the judgment of the Court of Appeal and direct it to remand the matter to the trial court with directions to vacate its order granting plaintiff's motion for summary adjudication and to enter a new order denying that motion.

KENNARD, J.

Cite as 98 C.D.O.S. 1376

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., et al., Petitioners,

v.

THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent;

ESQ BUSINESS SERVICES, INC., Real Party in Interest.

No S057125
In the Supreme Court of California
CT. App. 6 H014880
Santa Clara County Super. Ct. No. CV737595
Filed February 25, 1998

ORDER MODIFYING OPINION (NO CHANGE IN JUDGMENT)

BY THE COURT:

The opinion herein appearing at 17 Cal.4th 119 is modified as follows:

Add the following language after the first sentence and citation on page 131: "Likewise, the Act does not apply to the preparation of or participation in labor negotiations and arbitrations arising under collective bargaining agreements in industries subject to federal law. (See, e.g., *Teamsters Local v. Lucas Flour Co.* (1962) 369 U.S. 95, 103; *see also* Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a).)"

This modification does not affect the judgment.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

March 5, 1998

Mr. David W. Mitchell
Hoge, Fenton, Jones & Appel
Sixty South Market Street
San Jose, CA 95113-2396

Re: ESQ Business Services, Inc., et al.
v. Birbrower, Montalbano, Condon &
Frank, P.C., et al.
Application No. A-660

Dear Mr. Mitchell:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on March 5, 1998, extended the time to and including May 5, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Jeffrey D. Atkins
Jeffrey D. Atkins
Assistant Clerk

BIRBROWER, MONTALBANO, CONDON & FRANK, et al., Petitioners, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; ESQ BUSINESS SERVICES, INC., Real Party in Interest.

No. H014880

COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

49 Cal. App. 4th 801; 1996 Cal. App. LEXIS 908; 56 Cal. Rptr. 2d 857; 96 Cal. Daily Op. Service 7212; 96 Daily Journal DAR 11761

September 25, 1996, Filed

SUBSEQUENT HISTORY: Review Granted January 15, 1997 (S057125); Reported at: 1997 Cal. LEXIS 44. (See 17 Cal. 4th 119).

PRIOR HISTORY: Superior Court of Santa Clara County. Super. Ct. No. CV737595. Hon. John F. Herlihy, Judge.

DISPOSITION: Petition for writ of mandate denied.

COUNSEL: William J. Elfving; Hoge, Fenton, Jones & Appel, for Petitioner.

No Appearance for Respondent.

Robert W. Ricketson; Hopkins & Carley, for Real Party in Interest.

JUDGES: COTTLE, P.J.; BAMATTRE-MANOUKIAN, J., and MIHARA, J., concurring.

OPINION BY: COTTLE

OPINION:

COTTLE, P.J.:

ESQ Business Services, Inc. (ESQ), a California corporation, brought an action against the New York law firm of Birbrower, Montalbano, Condon & Frank, P.C. (the Birbrower firm), for legal malpractice. The Birbrower firm removed the case to federal court and there filed a counterclaim, California's equivalent of a cross-complaint, seeking its attorney fees under an attorney fee agreement entered into in New York. After the case was remanded to the state court, ESQ brought a motion for summary judgment or summary adjudication of issues on those causes of action in its complaint and in the Birbrower firm's counterclaim regarding the validity of the attorney fee agreements. The trial court granted ESQ's motion for summary adjudication of issues, determining that the attorney fee agreements were unenforceable because the Birbrower firm had engaged in the unauthorized practice of law in California.

The Birbrower firm petitioned this court, pursuant to Code of Civil Procedure section 437c, subdivision (1), for a writ of mandate directing the trial court to vacate its summary adjudication order. We stayed the trial court proceedings and issued an alternative writ to permit further consideration of the issues raised in the petition, i.e., whether out-of-state attorneys who perform legal services in California, but are not licensed to practice in California, can enforce attorney fee agreements that include the California services. As will appear, we conclude that they may not. Accordingly, we shall deny the Birbrower firm's petition for writ of mandate.

FACTS

With respect to the unauthorized practice of law issue,[1] ESQ set forth the following facts, which the Birbrower firm agreed were undisputed: "Defendant Birbrower, Montalbano, Condon & Frank, P. C., is a professional law corporation incorporated in the State of New York with its principal place of business in New City, New York. [P] 2. Defendant Kevin Hobbs ('Hobbs') is an attorney employed by the Birbrower firm. [P] 3. Defendant Thomas A. Condon ('Condon') is an attorney employed by the Birbrower firm. [P] 4. Hobbs has never been licensed to practice law in California. [P] 5. Condon has never been licensed to practice law in California. [P] 6. No attorney affiliated with the Birbrower [firm] during 1990-1993 was licensed to practice law in California. [P] 7. ESQ Business Services, Inc. ('ESQ'), was and is a California corporation with its principal place of business in Santa Clara County California. [P] 8. In or about July 1992, ESQ and the Birbrower firm entered into a 'Retainer Agreement' whereby the Birbrower firm agreed to provide certain legal services to ESQ. [P] 9. The Retainer Agreement called for the Birbrower firm to provide legal services including 'All matters pertaining to the investigation of and prosecution of all claims and causes of

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[1] ESQ's separate statement of undisputed facts also set forth facts relating to the content and validity of the attorney fee agreements. The Birbrower firm agreed that these facts were also undisputed. We do not set them forth here, however, because the court granted ESQ's motion solely on the basis of its first argument: that the fees were unenforceable because the Birbrower firm had engaged in the unauthorized practice of law.

action against Tandem Computers Incorporated. . . . ' [P] 10. The 'claims and causes of action against Tandem' related to a contract entitled 'Software Development and Marketing Agreement' dated March 16, 1990 (the 'Tandem Agreement'). [P] 11. Tandem Computers, Incorporated ('Tandem') was and is a Delaware corporation with its principal place of business in Santa Clara County California. [P] 12. The Tandem Agreement provided that it was to be governed by and interpreted under California law. [P] 13. In the course of representing ESQ against Tandem pursuant to the Retainer Agreement, the Birbrower firm, through Hobbs and/or Condon, did all of the following: [P] a. The Birbrower firm filed a demand for arbitration on behalf of ESQ against Tandem with the San Francisco, California offices of The American Arbitration Association. [P] b. In or about August 1992, Hobbs and Condon traveled to California for a series of meetings with ESQ, ESQ's accountants, and Tandem's representatives. [P] c. During the course of the August 1992 meetings in California, Hobbs and/or Condon discussed with ESQ and ESQ's accountants various matters regarding the substance of the Tandem dispute and strategy for resolving the dispute. [P] d. During the course of the August 1992 meetings in California, Hobbs and/or Condon made recommendations and gave advice concerning strategy for resolving the Tandem dispute. [P] e. During the course of the August 1992 meetings in California Hobbs and Condon met with Tandem representatives four or five times over a two-day period. [P] f. During the course of the August 1992 meetings in California with Tandem representatives, Hobbs and Condon spoke on ESQ's behalf, setting forth ESQ's positions. [P] g. During

the course of the August 1992 meetings in California with Tandem's representatives, Hobbs made a demand for payment by Tandem to ESQ in the amount of $15 million and Condon communicated to Tandem his belief that if the matter were litigated, damages could exceed $15 million. [P] h. In or about March or April of 1993, Hobbs, Condon, and one other Birbrower firm attorney visited California for the purpose of interviewing potential arbitrators and meeting with ESQ and its accountants. [P] i. During the March or April 1993 trip to California, Hobbs met with ESQ and discussed, among other things, various business plans of ESQ and the potential impact of those plans on the dispute with Tandem. [P] j. On or about August 30, 1993, Hobbs traveled to California for the stated purpose of assisting ESQ in reaching a settlement agreement with Tandem. [P] k. On or about August 30, 1993, and August 31, 1993, while in California, Hobbs met with ESQ and ESQ's accountants to discuss the proposed settlement agreement, met with Tandem's representatives to propose and discuss changes to the proposed settlement agreement, and reviewed and commented on multiple revised drafts of the proposed settlement agreement. [P] l. While in California, on or about August 30 and 31, 1993, Hobbs gave ESQ legal advice, including, but not limited to, an opinion that ESQ should not settle the dispute with Tandem on the terms proposed. [P] 14. At no point in the course of the representation under the Retainer Agreement did the Birbrower firm retain or associate any co-counsel."

The Birbrower firm set forth the following additional relevant facts, which it contended were also undisputed: that ESQ knew petitioner was not licensed to practice law

in California and that the original retainer agreement was executed in New York.

Based on these undisputed facts, the trial court found that (1) the Birbrower firm was "not admitted to the practice of law in California," (2) the Birbrower firm "did not associate California counsel," (3) the Birbrower firm "provided legal services in this state," and (4) "the law is clear that no one may recover compensation for services as an attorney in this state unless he or she was a member of the state bar at the time the services were performed." Consequently, the court determined that ESQ was entitled to summary adjudication of the first through fourth causes of action in the Birbrower firm's " 'counterclaim' " and of the third and fourth causes of action of its second amended complaint, because the underlying attorney fee agreements were unenforceable.[2]

At the hearing on the motion, the court also noted: "It seems to me that those are some of the issues that this Court has to struggle with, and then it becomes a question of if they aren't allowed to collect their attorney's fees here, I don't think that puts the attorneys in a position from being precluded from collecting all of their

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[2] Granting summary adjudication on these issues left the following to be decided at trial: (1) ESQ's malpractice action against the Birbrower firm, and (2) the fifth through seventh causes of action in the Birbrower firm's counterclaim. The fifth cause of action was for quantum meruit (the reasonable value of legal services provided), the sixth was for damages based on fraud and deceit, and the seventh was for damages for negligent misrepresentation.

attorney's fees, only those fees probably that were generated by virtue of work that they performed in California and not that work that was performed in New York."

The Birbrower firm petitioned this court for a writ of mandamus directing the trial court to vacate its summary adjudication order. ESQ concurred with the Birbrower firm that immediate appellate review of this petition was appropriate; however, it urged this court to deny the writ application on the merits. We issued an alternative writ and requested additional briefing from both petitioner and real party in interest, ESQ. We have considered their briefs and now conclude that the trial court's order was proper, for the reasons stated by the trial court. Accordingly, we shall deny the Birbrower firm's petition.

DISCUSSION

Business and Professions Code section 6125[3] states that "no person shall practice law in California unless the person is an active member of the State Bar." No one in the Birbrower firm was an active member of the State Bar of California or associated with counsel who was. Thus, if the Birbrower firm "practiced law in California," it did so in violation of section 6125. This petition raises two questions: (1) whether the Birbrower firm's activities in California constituted the practice of law, and (2) if so, whether the violation renders the attorney fee agreement unenforceable.

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[3] All further statutory references are to the Business and Professions Code unless otherwise specified.

Although the term "practice of law" is not defined by statute, "the cases on illegal practice have given it a most comprehensive meaning." (1 Witkin, Cal. Procedure (3d ed. 1985) Attorneys, § 295, p. 331.) "While courts have experienced difficulty in formulating a precise and all-embracing definition as to what constitutes the practice of law, the one generally accepted is that announced in *Eley v. Miller, 7 Ind.App. 529, 535 [34 N.E. 836, 837]*, and adopted by our Supreme Court in *People v. Merchants' Protective Corp. (1922) 189 Cal. 531, 535 [209 P. 363, 365]*, as follows: 'as the term is generally understood, the practice of law is the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure. But in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be [ ] pending in court.' (Emphasis added.) [Citations.]" (*Agran v. Shapiro (1954) 127 Cal.App.2d Supp. 807, 812, 273 P.2d 619*; accord, *Mickel v. Murphy (1957) 147 Cal.App.2d 718, 721, 305 P.2d 993; People v. Sipper (1943) 61 Cal.App.2d Supp. 844, 846, 142 P.2d 960*, overruled on another ground in *Murgia v. Municipal Court (1975) 15 Cal.3d 286, 301, 124 Cal.Rptr. 204, 540 P.2d 44; People v. Ring (1937) 26 Cal.App.2d Supp. 768, 771, 70 P.2d 281; People v. California Protective Corp. (1926) 76 Cal.App. 354, 359, 244 P. 1089; Smallberg v. The State Bar (1931) 212 Cal. 113, 119, 297 P. 916.*)

Even a single incident of giving of legal advice for a fee constitutes the practice of law within the meaning of section 6125. (*People v. Sipper, supra, 61 Cal.App.2d Supp. at p. 846; People v. Ring, supra, 26 Cal.App.2d Supp. at p. 771.*)

Additionally, it is not necessary that the matter with respect to which the advice was given be pending before a state court. (*Mickel v. Murphy, supra, 147 Cal.App.2d at p. 722; State Bar of California v. Superior Court (1929) 207 Cal. 323, 278 P. 432; People v. Sipper, supra, 61 Cal.App.2d Supp. at p. 846; Cohn v. Thompson (1932) 128 Cal.App.Supp. 783, 788, 16 P.2d 364.*)

In the course of representing ESQ against Tandem pursuant to the retainer agreement, the Birbrower firm engaged in numerous activities in California. These activities are set forth in detail in this opinion's statement of facts at pages 2-5 (undisputed facts 13(a) through 13 (l)) and will not be repeated here. Suffice it to say, these activities clearly constitute the "practice of law" as defined by the above cited California cases. The Birbrower firm gave legal advice and counsel to ESQ in California, it made settlement demands to Tandem on ESQ's behalf, it assisted in negotiating and drafting a settlement agreement, and it filed a demand for arbitration. Under California cases defining the practice of law, the Birbrower firm's in-state activities clearly constituted the practice of law.

Since the Birbrower firm practiced law in California without being licensed to practice in this state, it violated the proscription against unauthorized practice contained in section 6125. We now turn to the second question raised in this writ petition: does the firm's violation of section 6125 make the attorney fee agreement unenforceable?

To answer this question, both the Birbrower firm and ESQ rely on an ALR annotation entitled "Right of Attorney Admitted in One State to Recover Compensation for Services Rendered in Another State Where he was not Admitted to the Bar." (*11 A.L.R.3d 907.*) The annotation states the general rule that "an attorney who is not admitted to practice in the state where he performs services is not entitled to recover compensation for such services even though he is admitted to practice in another state." (11 A.L.R.3d, § 3 [a], p. 908.) It also lists exceptions to the general rule. It is these that the Birbrower firm calls to our attention.

The first exception concerns practice in federal courts. (11 A.L.R.3d, § 5, pp. 912-913.) Several cases, including two in California, have allowed attorneys to recover their fees where the services rendered involved practice before federal courts, reasoning that states have no jurisdiction to purport to regulate practice before the federal courts. (See e.g., *Cowen v. Calabrese (1964) 230 Cal.App.2d 870, 41 Cal.Rptr. 441; In re McCue (1930) 211 Cal. 57, 293 P. 47; Spanos v. Skouras Theatres Corporation (S.D.N.Y. 1964) 235 F.Supp. 1.*) The Birbrower firm contends that because the ESQ-Tandem dispute was going to be arbitrated before the American Arbitration Association, this was akin to practice before the federal courts. We disagree. None of the supremacy issues applicable if a state were to attempt to regulate an attorney's practice in federal courts would apply in the situation where litigants have chosen an alternative forum to resolve their disputes.

The second exception is labeled "services not involving courtroom appearance." (11 A.L.R.3d, § 4, p. 911.) It

states that a few courts have allowed attorneys to recover fees where the services they rendered in the local jurisdiction did not involve courtroom appearances or other actual litigation before the state courts. The annotation lists two cases applying this exception, and the pocket part lists a third. In the first, a 1912 case, a New Jersey attorney successfully sued his client in New Jersey for services he provided in a corporate reorganization, even though some of the services were rendered in North Carolina, where he was not licensed. (*Wescott v. Baker (1912) 83 N.J.L. 460, 85 A. 315.*) This case is distinguishable; for this case to be analogous, the Birbrower firm would have had to sue ESQ in New York for legal services rendered. In any event, California cases have consistently held that it is not necessary that a matter be pending in state court. The critical inquiry is whether the unlicensed person rendered legal advice and counsel or prepared legal instruments or contracts by which legal rights were secured. (*Mickel v. Murphy, supra, 147 Cal.App.2d at p. 722; State Bar of California v. Superior Court, supra, 207 Cal. 323; People v. Sipper, supra, 61 Cal. App. 2d Supp. at p. 846; Cohn v. Thompson, supra, 128 Cal. App. Supp. at p. 788.*) The other two cases employing this exception were *Spanos v. Skouras Theatres Corporation, supra, 235 F. Supp. 1,* cited in the previous paragraph for also applying the "practice in federal courts" exception, and *Dietrich Corp. v. King Resources Co. (10th Cir. 1979) 596 F.2d 422.* In both of those cases, however, the out-of-state attorney worked with local attorneys. Clearly if the Birbrower firm had associated with locally licensed attorneys, its fees would have been recoverable. All the

remaining cases cited in the annotation rejected this exception, as do we.

A third exception has been made in a "few cases" where the attorney "makes a full disclosure to his client of his lack of local license and does not conceal or misrepresent the true facts." (11 A.L.R.3d, § 3[b], p. 910.) One of the three cases cited is *Spanos v. Skouras Theatres Corporation, supra, 235 F. Supp. 1,* which also employed the first two exceptions, including the exception for practice before the federal courts that is recognized in California. The second case, from 1845, allowed a New Hampshire attorney to recover for services rendered in Massachusetts after May 1, 1836, when a revised statute went into effect containing no express prohibition of recovery by an unlicensed attorney. (*Ames v. Gilman (1845) 51 Mass. 239.*) California, in contrast, has a statute, section 6125, which prohibits practice within the state by anyone, including lawyers licensed in other states, who are not members of the California State Bar. The third case, *Freeling v. Tucker (1930) 49 Idaho 475, 289 P. 85,* allowed an Oklahoma attorney to recover for services rendered in an Idaho probate court. The court presumed in favor of the attorney that the court in which he had tried the case had extended to him the right to appear as a matter of comity.

There are no California cases that have applied the "full disclosure" exception, and we reject it. The exception does not further the important state interest in regulating attorneys who practice law in this state. An out-of-state lawyer has not established that he or she is familiar with this state's laws and procedures. Nor is an out-of-state lawyer subject to the disciplinary controls that the State Bar maintains over its members. Additionally, an

out-of-state lawyer has not demonstrated his or her competence before the bar of this state. It is not in California's best interest to have its citizens subject to the risk of placing their legal affairs into the hands of a person who has not satisfied the requirements for admission to the State Bar and who has not associated with local counsel.

The last exception upon which the Birbrower firm relies is in cases requiring "interstate representation." (11 A.L.R.3d, § 6, p. 913.) This exception is inapplicable under the facts presented here, however. The underlying dispute was between Tandem, based in California, and ESQ, also based in California. ESQ alleged that Tandem violated the Software Development and Marketing Agreement that the parties entered into in California in March 1990. That agreement specified that "[t]he internal laws of the State of California (irrespective of its choice of law principles) shall govern the validity of this Agreement, the construction of its terms, and the interpretation and enforcement of the rights and duties of the parties hereto." Nothing about this dispute was interstate in nature. Consequently, the exception does not apply.

Since none of the exceptions apply, the Birbrower firm is subject to the general rule enunciated in the annotation: an out-of-state attorney who renders services locally is not entitled to recover fees for the local services. As the court stated in *Hardy v. San Fernando Valley C. of C. (1950) 99 Cal. App. 2d 572, 222 P.2d 314*, "It is unlawful for a person not an active member of The State Bar to practice law in this state. (. . . § 6125.) Practicing without being a member is a misdemeanor. (. . . § 6126.) No one may recover compensation for services as an attorney at law in this state unless he was at the time the services

were performed a member of The State Bar. (See 7 C.J.S. 1022, § 165 and cases cited; 5 Am.Jur. 353, § 156 and cases cited; Anno. *118 A.L.R. 652.*)" (*Id.*, at pp. 576-577.) The Birbrower firm attempts to distinguish the facts in this case from the facts in Hardy. However, it is not the facts in Hardy that dictate its result. Whether a person may recover compensation for services as an attorney at law requires first and foremost that the person be a member of the State Bar when the services were rendered. Only if that prerequisite is met do other facts become relevant.

In the instant case, the court has allowed the Birbrower firm to pursue its claim for quantum meruit. In addition, the court has indicated it sees no impediment in the Birbrower firm recovering the reasonable value of the services rendered in New York. However, the attorney fee agreement is void and unenforceable for the reason that it includes payment for services rendered in California, to a California client, in a California dispute, between California parties, over a contract entered into in California, which was to be governed by California law. When New York counsel decided to accept this representation, it should have researched California law, including the law governing the practice of law in this state. It never associated with California counsel, yet it engaged in numerous acts in California that constituted the unauthorized practice of law in this state. We conclude that the trial court correctly granted ESQ's motion for summary adjudication of issues.

DISPOSITION

The petition for writ of mandate is denied.

BAMATTRE-MANOUKIAN, J., and MIHARA, J., concurring.

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

ESQ BUSINESS SERVICES, INC., a California corporation, et al., Plaintiffs, v. BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., a New York corporation, et al., Defendants.	No. CV737595 **ORDER** (Filed Jan. 8, 1996)
AND RELATED CROSS-ACTION.	

The motion of plaintiffs and cross-defendants (collectively "ESQ") for summary judgment and/or summary adjudication came on regularly for hearing on December 14, 1995, in Department 12 of the above-entitled court, the Honorable John F. Herlihy presiding. Hopkins & Carley, A Law Corporation, by Robert W. Ricketson, appeared as attorneys for ESQ. Hoge, Fenton, Jones & Appel, Inc., by William J. Elfving, appeared as attorneys for defendants and cross-complainants (collectively "Birbrower").

The court declines to render formal rulings on the evidentiary objections, but has disregarded all inadmissible and incompetent evidence in ruling. *Biljac Assoc. v. First Interstate Bank of Oregon* (1990) 218 Cal. App. 3d 1410, 1419-1420.

After full consideration of the evidence, memoranda of points and authorities, and separate statements submitted by the parties, and oral arguments of counsel, the court finds that each and every fact set forth in ESQ's separate statement of facts is undisputed as shown by the evidence cited therein and as shown by Birbrower's response thereto, which response states that each of the facts set forth in ESQ's separate statement is undisputed. More specifically:

(a) It is undisputed that Birbrower and the attorneys associated with the Birbrower firm, were not admitted to the practice of law in California. (ESQ's separate statement Nos. 4, 5, 6.) It is undisputed that Birbrower did not associate California counsel in connection with the representation of ESQ. (ESQ's separate statement No. 14.)

(b) It is undisputed that Birbrower provided legal services in this state. (ESQ's separate statement No. 13.) (*People v. Landlords Professional Services* (1989) 215 Cal. App. 3d 1599, 1604.)

(c) The law is clear that no one may recover compensation for services as an attorney in this state unless he or she was a member of the state bar at the time those services were performed. (*Hardy v. San Fernando Valley Chamber of Commerce* (1950) 99 Cal. App. 2d 572, 576.)

ESQ has therefore met its initial burden of showing that: (1) it has a complete defense as to the First through Fourth Causes of Action (entitled "claims for relief") of the cross-complaint (entitled "counterclaim"); and (2), as to the complaint, both the "Retainer Agreement," a copy of which is attached as Exhibit A to the cross-complaint,

and the untitled document a copy of which is attached as Exhibit B to the cross-complaint, are unenforceable. (CCP §§ 437c(o)(2), 437c(n)(1).)

Birbrower has not come forward with admissible evidence showing the existence of a triable issue of material fact with regard to the above.

As a result, ESQ is entitled to summary adjudication. CCP § 437c(f)(1). ESQ's motion for summary adjudication of the First, Second, Third and Fourth Causes of Action of Birbrower's cross-complaint is granted. ESQ's motion for summary adjudication of the Third and Fourth Causes of action of the second Amended Complaint is granted.

Having found summary adjudication of these matters proper on the grounds described above, the court declines to reach the two alternative grounds set forth in ESQ's motion.

IT IS THEREFORE ORDERED that the motion for summary adjudication is GRANTED in the particulars described above, and that the final judgment in this action shall, in addition to any other matters determined at trial, order judgment in accordance with the matters adjudicated herein.

DATED: 1/8/96

/s/ JOHN F. HERLIHY
JOHN F. HERLIHY
JUDGE OF THE
SUPERIOR COURT

APPROVED AS TO FORM:

HOGE, FENTON, JONES & APPEL, INC.

By: /s/ William J. Elfving, Esq.
William J. Elfving, Esq.
Attorneys for Defendants and
Cross-Complainants

HOPKINS & CARLEY

By: /s/ Robert W. Ricketson
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March 3, 1998

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The Honorable Ronald M. George, Chief Justice
of the Supreme Court of California
The Associate Justices of the Supreme Court
of California
303 Second Street, South Tower, 9th Floor
San Francisco, CA 94107

Re: *Birbrower, Montalbano, Condon & Frank, P.C. v. The Superior Court of Santa Clara County*, 17 Cal. 4th 119

Dear Chief Justice George and Associate Justices:

We have read with interest and applaud your order, filed February 25, 1998, modifying your opinion in the above case to indicate that Business & Professions Code § 6125 does not apply to the preparation of or participation in labor negotiations and arbitrations arising under collective bargaining agreements in industries subject to Federal law.

The *Birbrower* opinion has been a subject of wide interest among lawyers not only in California, but elsewhere in the country, and has been a source of concern

and confusion as to its implications for multi-state practice of law. We believe it important that the Court take the opportunity now to recognize what are several obvious exceptions to Business & Professions Code § 6125 that are not currently recognized in the opinion, even as modified. This is particularly important in view of the Court's statement (17 Cal. 4th at 129) that "Exceptions to Section 6125 do exist, but are generally limited to allowing out-of-state attorneys to make brief appearances before a state court or tribunal. They are narrowly drawn and strictly interpreted."

Among the circumstances where the Court, in the interest of clarity, could make clear that § 6125, properly construed, does not raise issues of unauthorized practice of law, are the following:

(1) Business & Professions Code § 6125 does not apply to practice before many Federal administrative agencies. See *Sperry v. Florida ex rel Florida Bar,* 373 US 379 (1963) (Patent & Trademark Office); *Keller v. Wisconsin ex rel State Bar of Wisconsin,* 374 US 102 (1963) (Interstate Commerce Commission), 5 USC § 500(b).

(2) Business & Professions Code § 6125 does not apply to practice before many state administrative agencies. See, e.g., 80 Ops. Cal. Atty. Gen. 221 (1997); *Welfare Rights Org. v. Crisan,* 33 Cal. 3d 766 (1993); *Staley v. California Unemp. Ins. App. Bd.,* 6 Cal. App. 3d 675 (1970); 18 Cal. Code of Regs. § 5073 (State Board of Equalization); Cal. Revenue & Taxation Code § 21011(c) Franchise Tax Board).

(3) Business & Professions Code § 6125 does not apply in the case of an attorney licensed in another

jurisdiction who is supervised by an attorney licensed in California. See *Estate of Condon v. McHenry*, 55 Cal. App. 4th 1456, 1462 n.6 (1997); in this connection, compare California Supreme Court Rule 983.2 dealing with certified law students, which permits law students certified by the State Bar who have completed one year of study at an accredited law school to engage in certain permitted activities with appropriate supervision, including negotiations for a client, giving legal advice to a client, and appearances on behalf of a client (subject to direct supervision) in depositions and other proceedings. We believe Rule 983.2 could apply by analogy to the concept of supervision by California practitioners of experienced attorneys licensed in other jurisdictions.

(4) Business & Professions Code § 6125 should not apply where services are rendered only to an attorney licensed in California (including in-house counsel for a client) and not directly to a non-attorney client. See *The Dietrich Corporation v. King Resources Company*, 596 F.2d 422, 426 (10th Cir. 1979).

(5) The California legislature has made clear that there is an exception from Business & Professions Code § 6125 for lawyers not licensed in California who are in this state only temporarily and who practice as limited liability partnerships or professional corporations. A law firm that operates as a foreign limited liability partnership is required to register under § 16959(a) of the California Corporations Code only if it is transacting intrastate business in California. Section 16959(n)(9) provides that such a partnership shall not be considered to be transacting intrastate business solely by reason of conducting an isolated transaction that is completed

within 180 days and not in the course of a number of repeated transactions of like nature. Similarly, § 13405(a) of the California Corporations Code provides that nothing in that section is intended to prohibit the rendition of occasional professional services in California as an incident to a professional employee's primary practice for a foreign professional corporation qualified to render professional services in California, so long as it is permitted by the governing agency that regulates the particular profession in California. A similar exception should be permitted for a multi-state law firm with California offices whose non-California attorneys are in California only temporarily.

(6) Business & Professions Code § 6125 should not apply where an attorney not licensed in California is rendering services to a client not located in California, and in the course of rendering the services has occasion to act on behalf of the client in California where no court appearance in California is required. This view has been articulated in the most recent draft of the American Law Institute's Restatement of the Law Governing Lawyers, § 3 and comment *e* to § 3, and has been approved by the ALI Council (see Council Draft No. 13, October 8, 1997), and is being submitted to the ALI membership for consideration at its Annual Meeting in May 1998.

In addition to the foregoing exceptions, we should note that the modification to the *Birbrower* opinion filed on February 25, 1998, itself raises a question as to whether the Court intended to construe § 6125 as not applying to any matter where a uniform rule under a Federal statute or regulation is important, so that the reference to collective bargaining was simply illustrative,

or whether the Court intended to limit the modification only to issues arising under the Labor-Management Relations Act of 1947, and if so, why?

The subject of multi-state practice of law is of great significance to the legal profession nationwide. We respectfully suggest that it deserves a fuller briefing for the Court's consideration, and we therefore request that the Court defer remanding the *Birbrower* case until such a briefing can be submitted. We as a Firm are prepared to file promptly an amicus brief in support of the views expressed in this letter, and request that the Court permit time for such a brief to be submitted.

Respectfully submitted,

/s/ Marshall L. Small
Marshall L. Small
General Counsel to the Firm

California Dispute Resolution Council

promoting effective, accessible conflict resolution services statewide

(Board of Directors Omitted in Printing)

February 3, 1998

Honorable Chief Justice of the Supreme Court
Ronald George and the Associate Justices
303 Second Street, South Tower
San Francisco, CA 94107

Re: *Birbrower, Montalbano, Condon & Frank v. Superior Court No. S057125 (January 5, 1998)*

Dear Chief Justice George and Associate Justices Chin, Mosk, Baxter, Werdegar, Brown and Kennard:

I write on behalf of the California Dispute Resolution Council (CDRC), whose membership includes leaders from all the major dispute resolution organizations in California, all sectors of practice and all types of organizational affiliations. Among CDRC's individual members are prominent practitioners (both paid and volunteer service providers), directors and staff from a wide variety of practice organizations (both for-profit and non-profit), retired judges, trainers, and leading academicians.

We are concerned that this decision may have an unintended effect on arbitration, both in private contractual arbitrations and public sector collective bargaining arbitrations. Since *Birbrower* sometimes uses the term "private arbitration" (1998 LEXIS 2, 26) and sometimes refers only to "arbitration" (1998 LEXIS 2, fn4, 26) it may be thought to reach arbitration under public sector collective bargaining agreements. If so, it has the potential for great disruption of labor-management relations.

In my experience (which is confirmed by other CDRC members with similar practices) in approximately one-half the public sector arbitrations one or both sides are represented by non-lawyers. Typically, a county will be represented by its labor relations director and the union will be represented by a business representative, or a school district will be represented by the Assistant Superintendent for Personnel while the teacher union will be represented by a field representative. Similarly, in private contractual arbitration the parties have traditionally had the right to be represented by a non-lawyer. This right is often exercised in cases where one of the parties is a consumer.

The main reason for non-lawyer representatives is simple: if lawyers were required to prepare and present the case, the transaction costs for resolving the dispute would frequently exceed the amount in dispute. The parties choose arbitration because it is a fast and economical way of resolving work place disputes that might otherwise impair productivity or result in labor-management strife. If public sector entities and unions were required to use lawyers to prepare and present their arbitrations, they would be deprived of the means for resolving these disputes.

It is our understanding that the Court's decision will not become final until 30 days after it was filed and that the Court may on its own motion rehear it during that time. We do not believe that a formal re-hearing is necessary. Rather, we believe that the Court could simply clarify that neither "private arbitration" nor "arbitration" as it is

used in *Birbrower* is intended to cover public sector collective bargaining arbitration. As to private contractual arbitration, we respect the Court's determination of the appropriate forum for addressing our concerns.

Respectfully submitted,

/s/ Norman Brand
Norman Brand
President

Nancy K. Undem
Attorney At Law

February 27, 1998

Honorable Chief Justice of the Supreme Court
Ronald George and the Associate Justices
303 Second Street, South Tower
San Francisco, CA 94107

Re: *Birbrower, Montalbano, Condon & Frank v. Superior Court NO. SO57125 (January 5, 1998/Modified February 25, 1998)*

Dear Chief Justice George and Associate Justices Chin, Mosk, Baxter, Werdegar, Brown and Kennard:

I represent consumer/claimants in private contractual arbitrations before various stock, options and commodity exchanges, including the National Association of Securities Dealers, Inc. I also represent a non-attorney securities consumer advocates organization who also represents consumers in arbitrations before these exchanges.

These arbitration forums are self-regulated and arbitrations are conducted in accordance with the rules and regulations of the self-regulatory organization (SRO). These self-regulatory organizations (SRO's) have been empowered by the Securities and Exchange Commission (SEC) who, in turn, has been granted powers by Congress to regulate and establish rules for the SRO's.

The rules of these SRO's – the National Association of Securities Dealers (NASD), the American Stock Exchange (Amex), Boston Stock Exchange (BSE), Chicago Board Options Exchange (CBOE), Chicago Stock Exchange (CSE), New York Exchange (NYSE), Pacific Stock

Exchange (PSE), and the Philadelphia Stock Exchange (PhSE) – allow for representation of consumer/claimants by non-attorneys and attorneys licensed in other states. This court's ruling in *Birbrower* defines representation to be only by an attorney licensed in the State of California. The purpose for allowance of non-attorney and unlicensed attorney representation pursuant to the SRO rules was to enable consumers to have equal representation in arbitration.

We have read, with great concern, this court's decision on January 8, 1998, and applaud this court's Modification issued February 5, 1998 carving out an exception for "preparation of and participation in labor negotiations and arbitrations arising under collective bargaining agreements." However, this court did not say on what basis it was modifying its decision in *Birbrower.* We assume that this modification is based upon public policy grounds because of the large impact the decision would have on consumer/employees if their existing arbitration scheme is disrupted.

Identically, we urge the court to expand its modification to allow for non-attorney or non-licensed attorney representation before SRO's on the same basis and because arbitration under the rules of the SRO's are based on consumer agreements involving securities purchases which involve interstate commerce.

Finally, I would also like to call to the Court's attention the United States Supreme Court's decision to *Mastrobuno v. Shearson Lehman Hutton, Inc.,* 115 S.Ct. 1212 (1995) wherein the Court upheld an NASD arbitration award of punitive damages pursuant to provisions in the NASD's

Arbitrator's Manual, preempting New York State's Garrity rule prohibiting punitive damages in arbitrations in New York, where the parties' agreement did not contain a choice-of-law provision.

Similarly, consumers agree to arbitrate pursuant to the rules and regulations of the SRO's in their customer agreements with brokerage firms wherein arbitrators are not bound by any state laws; e.g. evidentiary rules.

I ask the Court to take this letter into account and further modify its decision in *Birbrower* to make express its inapplicability to resolution of disputes arising under consumer/customer agreements with brokerage firms pursuant to the SEC's scheme of arbitration concerning the arbitration of securities purchases before the SRO's.

I am associated with Alison Minet Adams (SBN107475) of Stronach and Adams, who is a member of the bar and also represents the non-attorney securities consumer advocates organization, who joins with me in this letter.

Thank you for your time and consideration.

Very truly yours,

/s/ Nancy K. Undem
Nancy Kay Undem
State Bar No. 177849